Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
United States Department of the Treasury,
Paul H. O'Neill, Secretary of the Treasury,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

120 pp.

QUESTIONS PRESENTED

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 185 (1959). The dynamics of the questions presented are dependant upon recognition of a constitutional obligation; conferring specific rights which are *indebitatus assumpsit* to the totally disabled veteran; whose status is inherent to the constitutional power of Congress to declare war. *United States v. Russell*, S.C., 13 Wall., 623-632 (1871) (citing *Curtis v. Fielder*, 2 Black, 478).

1. Do totally disabled veterans have an inherent Fifth Amendment liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. Title VII section 712 of the Civil Rights Act of 1964, as amended, states that "Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*". In *Brown v. General Services Administration*, 425 U.S. 830, 836 (1976) this Court held that "(Title VII) section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment."

The question presented is:

Does recognition of the constitutional right as stated in question number one; provide a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by this Court in *Brown v. General Services Administration*, supra. ?

3. Based upon the judicial standard presented in *Parham v. J.R.*, 442 U.S. 584, 609 (1979); the inherent Fifth Amendment liberty interests of totally disabled veterans cannot be judicially divorced from the attached due process interest which inures under the Constitution.

The question presented is:

Did the lower courts abuse their constitutional authority in the judicial abstention of that process which is due the constitutional obligation and statutory exception presented as questions number one and two ?

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JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254(1) as to the judgment of May 22, 2001 by the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions involved are the War Powers Clause, art. 1, section 8, cl. 11, 12, 18; the Jurisdiction of Courts Clause, art 3, section 2, cl. 1; and the Fifth Amendment. The public laws and statutes involved are Public Law 78-359 (Veterans Preference Act of 1944); Public Law 85-857 (Veterans Benefits) and Title 38 U.S.C. Veterans Benefits; Public Law 88-352 (Civil Rights Act of 1964); Public Law 92-261 (Equal Employment Opportunity Act of 1972); Title 42 U.S.C. Chapter 21 - Civ ilRights Subchapter VI - Equa lEmployment Opportunities; Title 28 U.S.C. Judiciary and Judicial Procedure sections 1254, 1291, and 1331. Rules involved are Rule 15(a) and 54(b) of the Federal Rules of Civil Procedure, and Rule 10(a) and (c) of the Rules of the United States Supreme Court. All constitutional provisions, public laws, statutes, rules involved appear in App. A at 27-35.

STATEMENT OF CASE AND FACTS MATERIAL TO CONSIDERATION OF QUESTION NUMBER THREE:

This petition addresses the implied promise within the constitution conferring rights specific to totally disabled veterans; the refusal of Congress to deny

those rights under the Civil Rights Act of 1964, as amended; and the judicial abuse of the right to due process in the recognition and protection of constitutional rights specific to totally disabled veterans.

Federal jurisdiction (Title 28 U.S.C. section 1331) over the subject matter of this complaint (App. A at 37, 72, App. B at 19-20, 29, 41, App. C at 3-4) arose under the Federal Constitution (Article 1. section 8, cl. 11, 12, 18), and the Fifth Amendment to the Constitution in concert with section 712 of the Civil Rights Act of 1964 (P.L. 88-352, Title 42 U.S.C. section 2000e-11).

Question number one was initially presented by petitioner (hereafter Blough) in th ecourse of a district court hearing (App. A at 72, App. B-10, 13, 19-20) in the prior litigation; in the motion to amend the complaint in the prior litigation (App. B-29, 40); in response to respondent's (hereafter Government's) motion for summary judgment in the prior litigation (App. B-50); in the brief/ reply brief/petition for rehearing en banc of the appeal in the prior litigation (App. B at 80-155); in the complaint as filed with the district court in the current litigation (App. C-1); in response to Government's motion for summary judgment in the current litigation (App. C-14); and in the brief/reply brief/petition for en banc consideration in the current appeal (App. C at 50-156). The Government, the district court and the appellate court did not address question number one in the prior or current litigation (App. A-1, 9, 14, 20, App. B-6, 33).

Question number two was initially presented by Blough in the course of a district court hearing (App. A at 56) in the prior litigation; in the motion to amend the complaint in the prior litigation (App. B-29, 40); in the brief /reply brief/petition for rehearing en banc of

the appeal in the prior litigation (App. B at 80-155); in response to Government's motion for summary judgment in the current litigation (App. C-14); and in the brief/reply brief/petition for en banc consideration in the current appeal (App. C at 50-156). The district court and the appellate court did not address question number two in the current or prior litigation (App. A-1, 9, 14, 20). Government relies, in its motion for summary judgment, upon this Court's determination that section 717 of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment, *Brown v. General Services Administration*, 425 U.S. 830 (1976), and therefore; Blough has no legal basis to complain of violations under the Fifth Amendment to the United States Constitution. The Government did also claim the limitations of *Brown v. General Services Administration*, supra, in Government's motion (App. B-33) in opposition to Blough's motion to amend the prior complaint to include a claim of constitutional tort (App. B-29).

The district court and the appellate court have, on five occasions prior to this appeal (App. A-1, 9, 14, 20, App. B-6), abstained from addressing Blough's complaint of constitutional tort and the Government's response (App. A-37 App. B-6, 29, 33, 40, 50, App. C-1). This complaint now revolves around questions of law and the conduct of the lower courts as opposed to the facts reflecting upon the violations of Blough's Fifth Amendment liberty interest by the Government. "Unfortunately, this 'is another instance of judicial haste which in the long run makes waste.'" *Estelle v. Gamble*, 429 U.S. 97, 113 (1976) (citing *Dioguardi v. Durning*, 139 F.2d 774 (C.A.2, 1944)).

The prior complaint as filed with the district court on June 29, 1998 did encompass a claim of civil rights

violations under Title VII of the Civil Rights Act of 1964, as amended (App. A-36). The prior complaint did reference Blough's physical disabilities and veterans status, threats of physical injury and retaliation, and the informal response/formal acceptance of said threats by the Government (Department of the Treasury and the Equal Employment Opportunity Commission). The same acts providing basis for claim of constitutional tort.

The claim to violation of a protected Fifth Amendment liberty interest was initially asserted before the district court in the presence of Government's counsel at an early stage of the prior proceedings and was recognized by the district court as the "underlying claim" (App. B at 10, 13, 19-20) based upon Blough's submission of February 16, 1999 (App. A at 72) which was filed and accepted by the court and Government.

Government's motion for summary judgment in the prior litigation was to be taken under submission by the district court on September 10, 1999. Briefs and affidavits of the parties were to be filed by said date. A motion to amend the initial complaint (App. B-29) under Rule 15(a) of the Federal Rules of Civil Procedure was filed with the district court one month prior to the date on which all briefs were required to be filed. The Government did respond to the court in opposition to said motion (App. B-33). The following notification was provided to the defendant (Government) within plaintiff's (Blough) motion to amend in the prior litigation (App. B-29):

> "Plaintiff respectfully requests that the Court grant this request to amend the initial Complaint to include a claim of action against Defendant for deprivation of a fundamental and protected liberty interest which exists within the Fifth

Amendment to the United States Constitution. Jurisdiction is conferred on the Court by 28 U.S.C. section 1331 in that the basis for this amended claim arises under the Federal Constitution.

Title VII of the Civil Rights Act of 1964 is not the exclusive remedy for Plaintiff in that Section 712 of the Act provides that 'nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans'. Under the analysis presented by the United States Supreme Court in Washington v. Glucksberg, 117 S. Ct. 2258 (1997); a one hundred percent (100%) physically disabled veteran has a fundamental constitutional right not to be threatened, harassed and retaliated against by the same government which put him in harms way in VietNam.

The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

Prior to September 10, 1999 the district court was in possession of Blough's motion to amend the prior complaint, memorandum of law in support of motion to amend the complaint, and the Government's motion in opposition to the motion to amend the complaint to include a claim of constitutional tort against Government (App. B-29, 33, 40).

"A complaint must contain, *inter alia*, ' a short and plain statement of the claim showing that the pleader

is entitled to relief.'" *Baldwin County Welcome Center v. Brown*, 446 U.S. 151 (1984) citing Fed. Rule Civ. Proc. 8(a)(2).

> "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

The notification (App. B-29, 40, 47) provided to defendant (Government) in the prior litigation not only met, but exceeded the requirements of *Baldwin County Welcome Center*, supra, and *Conley v. Gibson*, supra. The defendant was apprised of the substance of the allegation and the grounds upon which it rests. The actions describing when, how, to whom, and with what results were spelled out in great detail within the prior complaint (App. A-36) and were "also the basis of this Fifth Amendment claim".

The following statement is presented within the initial paragraph of the Order of the district court (App. A at 20):

> "This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107)."

The following statements were presented within Blough's response (Doc. No. 107) (App. B at 51, 77-78) to Government's motion for summary judgment.

> "Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil

Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint.

Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. The facts are consistent with each route; however the law and remedies differ.

1. Deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution."

The following statement is also presented within the initial paragraph of the Order of the district court (App. A at 20):

> "Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. 104 and 105."

Document 104 (App. B-40) is a five page memorandum of law in support of Blough's motion the amend the initial complaint to include a claim of constitutional tort against the Government (App. B-29) and was filed in response to the Government's motion in opposition to Blough's motion to so amend (App. B-33). In referencing document 104 within the Order, the district court judicially involved Blough's claim of constitutional tort (App. A-37, App. B-29, 33, 40).

The district court did concurrently grant Government's motion for summary judgment in the prior complaints of Civil Rights and Rehabilitation Act violations (App. A at 26); however did abuse its authority in that the court abstained from adjudication of Blough's motion to amend the initial complaint to include a claim of constitutional tort by Government (App. B-29, 40). The claim of constitutional rights violations which were put in issue by the district court as the "underlying claim" (App. B at 10) and in the amended complaint (App. B-29, 33, 40) were involved; however not adjudicated by the Order of the district court (App. A at 26). The Order of the district court granting Government's motion for summary judgment (App. A at 26) did summarily render all pending motions moot; including the motions to amend the initial complaint to include a claim of constitutional tort against Government (App. B-29, 40).

Blough's response (App. B-50) to Government's motion for summary judgment provides confirmation of the district court's failure to consider Blough's pleadings. The Order by the district court in the prior litigation (App. A-20) misrepresents the pleadings of both parties, creates an absurd scenario and then ridicules Blough for proposing the scenario.

Blough did appeal the prior decision of the district court (App. A-20) to the appellate court (case no. 99-13735-FF) in that the motions (App. B-29, 40) to amend the initial Complaint (App. A-36) to include a claim of constitutional tort by Government were raised and involved; however were not adjudicated by the Order of the district court (App. A-20). Copies of Blough's pleadings to the Eleventh Circuit are located within appendix B (App. B at 80-155) and did include those motions to amend the prior complaint (App. B-29, 33, 40). The appellate court affirmed by

abstention the failure of the lower court to adjudicate the claim of constitutional tort which was argued by Blough in his Brief ; Reply Brief ; and Petition for Rehearing En Banc (App. B at 80-155).

Blough did not seek review by this Court of the prior decisions of the district court (App. A-20) and appellate court (App. A-14). The finality of the decisions was limited to the cause of action under Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. The current claim of constitutional tort (cause of action), which is without finality, continues to be worthy of this Court's attention as a question of national import.

Blough returned to the district court and filed the current lawsuit (App. C-1) alleging those constitutional rights violations which were raised in the prior litigation (App. A-36, App. B-6, 29, 40, 50, App. C-14). The Complaint of August 8, 2000 (App. C-1) references the prior litigation and the failure of the Order of the district court (App. A-20) to adjudicate the merits of the complaint of constitutional tort (App. B-29, 33, 40) under the 'constitutional standards' required by this Court in *Washington v. Davis*, 426 U.S. 229, 240, 248, (1976). Government's motion for summary judgment in the current litigation did not reference Blough's motion to amend the prior complaint to include a claim of constitutional tort (App. B-29, 40) nor the Government's response to Blough's motion to so amend (App. B-33); all of which were documented with the court (App. C at 47-49) in Blough's response to Government's motion for summary judgment. The district court did again abstain from adjudicating Blough's complaint of constitutional tort and granted Government's motion for summary judgment based upon the doctrine of *res judicata* (App. A at 11-12).

Blough did appeal the current decision of the district court (App. A-9) to the appellate court (case no. 00-16546-F)(App. C at 50-156). The appellate court summarily affirmed the Order of the district court (App. A at 3) based upon the doctrine of res judicata as adjudicated "in the Eleventh Circuit", *Ragsdale v. Rubbermaid*, 193 F.3d 1235, 1239 (11th Cir. 1999), and did again affirm the district courts abstention by declaring as moot questions number one and two as presented to this Court (App. A at 3).

REASONS FOR GRANTING THE PETITION

This appeal warrants acceptance and consideration in matters of federal law and national import as to which the Supreme Court has final jurisdiction based upon the following considerations:

1. **The recognition of a constitutional obligation conferring inherent constitutional rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Palko v. State of Connecticut, 302* U.S. 319 (1937).**

   "Statutory rights and obligations are established by Congress ..... The Constitution, on the other hand, does not 'partake of the prolixity of a legal code' *McCulloch v. Maryland*, 17 U.S. 316 (1819). It speaks instead with a majestic simplicity. One of 'its important objects,' *ibid.*, is the designation of rights. And in 'its great outlines,' *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

The object of the Constitution was to establish the departments of government and define its powers in

general terms in order that "We, the people of the United States" may (among other stated purposes) "secure the blessings of liberty to ourselves and our posterity". To that purpose "Congress shall have the power to declare war".

> "'A great mass of human transactions depend upon implied contracts which are not written, but grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made'. There can be no more comprehensive definition of an implied contract. It applies to governments as well as individuals, and determines the liabilities of each, with the same regard to justice and reason." *United States v. Russell*, supra. (citing *Chief Justice Marshall, Gibbons v. Ogden*, 12 Wheat., 341).

> "*Indebitatus assumpsit* is founded upon what the laws term an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation". *United States v. Russell*, supra.

No continuing relation between the Federal Government and a citizen is more distinctively federal in character than that between it and the totally disabled veteran. The scope, nature, implied contracts and reciprocal obligations of the relation are derived from the constitution, are governed by federal authority, and have been the subject of Congressional recognition since the inception of the Republic. The Federal Government has the exclusive power to establish and define the relation by virtue of its military and other powers (including the powers of

Congress to 'provide for the common Defence,' 'To declare War,' 'raise and support Armies,' and 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers,' U.S. Const., Art. I, section 8).

While jurisdiction of this Court over the relation between the Federal Government and the totally disabled veteran is not conferred by the constitution in express words, it is inherent in the authority and purpose of this Court to safeguard constitutional rights and public interests. This Court, as an agency of the Federal Government is an "instrument for realizing a public purpose", *Scripps-Howard Radio v. Fed. Communications Com'n*, 316 U.S. 4 (1942), of Constitutional stature.

A constitutional right is fundamental if it is "preservative of all rights". *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The United States Government /Department of the Treasury and the respective Federal courts have violated and denied a constitutional obligation of "We, the people of the United States" to a totally disabled veteran. Inherent to status as a totally disabled veteran is a fundamental right to due process in the protection of Fifth Amendment liberty interests under the United States Constitution.

Beginning with our Nation's struggle for freedom two centuries ago, approximately 42 million men and women served their country during wartime periods. As of September 30, 1998; 2.3 million veterans were recognized by the United States Department of Veterans Affairs as veterans with service connected disabilities (of which one hundred sixty-one thousand three hundred sixty (161,360) were recognized as totally disabled (100%) (source: Department of Veterans Affairs FY 1998 Annual Report). As of

September 30, 1998; 1.8 million veterans were employed by the Federal Government. (source: Human Resources Division/Office of Personnel Management). The determination by the Federal Government as to status as a totally disabled veteran is provided under P.L. 85-857, Title 38 U.S.C., Part II, Chapter 11, Subchapter II, sections 1110, 1114(j).

Based upon the standards established by this Court in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), totally disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the same government which put them in harms way.

The violations of Blough's constitutional rights by Government were invidious in nature and so unjustifiable as to be violative of due process under *Bolling v. Sharpe*, 347 U.S. 497 (1954) and subject to challenge under *Washington v. Davis*, supra..

The abusive managerial environment within the United States Department of the Treasury did violate Blough's inherent Fifth Amendment right to be free from unjustified intrusions on personal security as provided in *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). The continuing threats of physical injury, the Government's written response (Internal Revenue Service and Equal Employment Opportunity Commission) that said threats were not carried out and therefore no process was due Blough, the continuing harassment and retaliation over a nine year period were all supported by extensive documentation and third-party testimony obtained during the discovery phase of the prior complaint and were presented to the respective court (App. A-43, App. B-50). Based upon the federal employment

incentives extended to disabled veterans by Congress and the constitutional obligation to totally disabled veterans, Blough's objective expectation of the "right to be free from and obtain judicial relief from unjustified intrusions on personal security" was justified and did rise to the level of a constitutionally protected liberty interest as presented in *Vitek v. Jones*, 445 U.S. 480, 493.

Blough suggests to the Court that the analytical structure under which this claim of constitutional tort should be addressed is presented in *Siegert v. Gilley*, 500 U.S. 226, 233 (1991), as opposed to *Harris v. McRae*, 448 U.S. 297, 308 (1980). The adjudication of the constitutional right presented as question number one is determinative of the special *right* of exception under the statute (Title VII section 712 of the Civil Rights Act of 1964) presented as question number two. In addition; the adequacy of due process presented as question number three is also dependant upon the adjudication of the constitutional right presented. When due process clause is invoked in novel context, court must begin inquiry with determination of precise nature of private interest that is threatened, and only after that interest has been identified, can court properly evaluate adequacy of process. *Lehr v. Robertson*, 463 U.S. 248 (1983).

> "Such a cause of action (constitutional violation) may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress.' The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14 (1980).

The cause of action presented as question number one was not an adverse action covered by the statutory scheme of the Civil Service Reform Act under Title 5 U.S.C. section 7512 and is therefore not a special factor counseling hesitation under the initial standard of *Carlson v. Green,* supra. In addition; Congress has taken affirmative action in the provision of federal district court review for a federal employee under the Civil Service Reform Act via Title 5 U.S.C. section 7703(b)(2), which provides that cases of discrimination subject to the provisions of Title 5 U.S.C. section 7702 shall be filed under the judicial review provisions of Title VII of the Civil Rights Act of 1964. Upon completion of the required period for administrative review Title 5 U.S.C. section 7702(e) (1) (c) and Title 42 U.S.C. section 2000e-16(c), Blough did initiate a Title VII action in the district court (App. A-36).

The threats of physical injury to a totally disabled veteran and the subsequent harassing and retaliatory actions of the Government employer may be addressed under Title VII of the Civil Rights Act of 1964 and the constitution as discussed in item number two below; thereby negating the second standard of *Carlson v. Green,* supra.

2. **The conflict between this Court's implied restriction in *Brown v. General Services Administration*, supra, and the explicit exception provided by Congress under section 712 Title VII of the Civil Rights Act of 1964, as amended. This conflict in law mandates adjudication by this Court and the concurrent constitutional question is unavoidable to resolution.**

The blanket restriction by this Court in *Brown v. General Services Administration*, supra, is subject to

modification based upon the Congressional exception of Title VII section 712 of the Civil Rights Act of 1964, as amended and the inherent constitutional right asserted in question number one.

> "The primary question in this litigation is not difficult to state: Is section 717 of the Civil Rights Act of 1964, as added by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. section 2000e-16 the exclusive individual remedy available to a federal employee complaining of job-related discrimination ? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe section 717's position in the constellation of antidiscrimination law. We must, therefor, infer congressional intent in less obvious ways." Brown v. General Services Administration, supra, at 824.

> "In the case at bar, as in *Preiser* and the other cases cited above, the established principal leads unerringly to the conclusion that section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, supra at 836.

Section 712 of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Services Administration, supra. Reliance by the Government on *Brown v. General Services Administration* is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 that "nothing contained in this title shall be construed to repeal or modify any Federal ..... law creating special rights ...

for veterans" and the findings by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights. Blough did make this argument in his motion to amend the prior complaint to include a claim of constitutional tort (App. B-29); in the prior appeal to the appellate court (App. B at 80-155); in response to Government's current motion for summary judgment (App. C-14); and in the current appeal to the court of appeals (App. C at 50-156).

The proceedings and debates of the 88th Congress relative to the Civil Rights Act of 1964 appear within the Congressional Record as S.1732 and H.R. 7152 (Public Law 88-352-July 2, 1964). Title VII was a very controversial portion of the Act; however there was no debate on section 712. The only difference in the exception provided within section 713 of the initial Senate and House bills (section 712 of the final bill) was directed to the special rights for veterans and did not include the additional reference to preference for veterans which was incorporated in the final bill which became law. Congress did by legislative process and statute distinguish veterans rights from veterans preferences.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. *Brown v. General Services Administration*, supra , at 824 (citing *Bolling v. Sharpe*, supra). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". *Brown v. General Services Administration*, supra at 832 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974).

"As we have had occasion recently to repeat, 'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975).

Section 717 of Title VII of the 1964 Civil Rights Act, as amended, leaves undisturbed whatever remedies Blough might otherwise possess. As in the case of *Brooks v. United States*, 337 U.S. 49 (1949), it would be absurd to believe congress did not have the constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964. Blough is permitted to pursue his rights under both Title VII of the Civil Rights Act of 1964, as amended, and any other law creating a right as a totally disabled veteran.

The Federal preference under section 712 Title VII of the Civil Rights Act of 1964 is based upon the Veterans' Preference Act of 1944. Preferences are clearly defined; however the rights of veterans are not defined; although guaranteed in both Acts. Here, the rights and preferences provided to veterans by Congress are reasonably and directly related to a legitimate, nondiscriminatory obligation of the constitution.

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" " *Connecticut v. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). The plain language of section 712 reflects upon a Congressional intent to ensure that Title VII does not disenfranchise veterans of other rights and preferences which they possess.

The plenary power of Congress to protect the totally disabled veterans is drawn implicitly from the inherent fundamental liberty interest of said veterans under Article 1, section 8, cl. 11, 12, 18 of the Constitution and the Fifth Amendment to the Constitution. The constitutional obligation to totally disabled veterans is of constitutional stature. It would be irrational to believe that Congress passed legislation in 1972 (i.e. section 717 of Title VII of the Civil Rights Act of 1964) which permitted the United States Government to violate the constitutional rights of totally disabled veterans in the employ of the United States Government.

Section 712 of Title VII of the Civil Rights Act of 1964 provides that section 717 is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of total disability. The fact said veteran is an employee of the United States Government cannot deprive him of his constitutional rights.

The section 717 Title VII restriction on remedy was inferred by the United States Supreme Court in *Brown v. General Service Administration*, supra; however the language of section 712 Title VII is explicit and has remained unchanged since Congressional enactment.

Generally, statutory classifications are valid if they bear a rational relationship to a legitimate governmental purpose. Statutes are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right .....*Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983).

Section 717 of Title VII of the Civil Rights Act of 1964, as amended, is not unconstitutional in that

Congress did provide protection to the fundamental constitutional rights of totally disabled veterans via section 712 of the respective Act.

The statutory exclusion provision of section 712 of Title VII of the Civil Rights Act of 1964, as amended, is compatible with the restrictions of section 717 of said Act. It is the blanket exclusive remedy of section 717 of the Act as inferred by the United States Supreme Court in *Brown v. General Services Administration*, supra, which is challenged based upon facts specific to this case. The constitutional right asserted in question number one must be recognized to challenge as a special right under Title VII section 712 of the Civil Rights Act of 1964, as amended, providing exception to the Supreme Courts inferred restriction in *Brown v. General Services Administration*, supra. This is a case of first impression in addressing the exception of section 712 Title VII of the Civil Rights Act of 1964.

3. **The judicial abuse by the lower courts in denying a constitutional obligation to due process.**

The current judgment under appeal (App. A at 1-8) contains the following conclusions which reflect an abuse of judicial authority:

A. "He (Blough) argues that, in the 1998 case, the district court violated his due process rights by summarily denying his motion to amend his complaint to add his Fifth Amendment claims and that this Court violated his due process rights by affirming the district court."

"We do not address Blough's contention that he was denied due process by the district court and this Court in his 1998 case, the 1998 case is not

properly before this Court."

RESPONSE

The refusal of the appellate court to address Blough's contention in the current litigation that he was denied due process in his complaint of constitutional tort in the prior litigation is fatal to the appellate court's finding of res judicata . As this Court noted in *Collins v. Miller*, 252 U.S. 364 (1920), the prior litigation must be reviewed to address the question of 'finality' presented by Blough in the current litigation. The purpose in Rule 15(a) of the Federal Rules of Civil Procedure is to afford the injured party a full and fair opportunity to be heard.

> "Finality,' for purposes of the application of Rule 54(b), is generally understood as that degree of finality required to meet the appealability requirements of 28 U.S.C. section 1291. *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427 (1956). Where a judgment is not 'final', within the terms of 28 U.S.C. section 1291, and hence not certifiable under Rule 54(b), it has no *res judicata* effect. In the words of the Supreme Court: ..... it is familiar law that only a final judgment is *res judicata* as between the parties". *G. & C. Merriam Co. v. Saalfield and Ogilvie*, 241 U.S. 22, 28 (1916). Acha v. Beame, 570 F.2d 57 (2nd Cir. 1978).

The Orders of the district court in the prior and current litigation (App. A-9, 20) are not "final" under Rule 54(b) with regard to the claim of constitutional tort (App. A at 37, App. B-6, 29, 33, 40, 50, App. C-1) which was raised and involved in the prior and current litigation; however was neither adjudicated by the district court nor addressed by the appellate court (App. A-1, 9, 14, 20). The Orders of the district court

(App. A-9, 20) are not certifiable as a "final" decisions subject to the jurisdiction of the appellate court 28 U.S.C. section 1291 with respect to the claim of constitutional tort. The affirmation of abstention by the appellate courts in the current and prior litigation was an abuse of authority in that the respective courts were without jurisdiction with regard to the claim of constitutional tort. The claim of constitutional tort in the prior (App. A at 37, 72, App. B at 19-20, 29, 33, 40, 77-78) and current litigation (App. C-1) is neither "final" under Rule 54(b) of the Federal Rules of Civil Procedure nor "moot" under *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

The court record clearly reflects the fact that the lower courts did abstain from consideration of the pleadings as presented by Blough. The actions of the lower courts were in fact a pretense of due process, *Palko v. State of Connecticut*, 302 U.S. 319 (1937), constituting an intentional abuse of judicial authority such as to call for an exercise in the supervisory power of the United States Supreme Court. The judicial abstention by the lower courts exceeds the discretionary standards for review by this Court under Rules 10(a) and 10(c).

B. "The district court correctly granted summary judgment to the defendants, based upon res judicata, because; (3) his 1998 case was decided against him by a final order on the merits by a court of competent jurisdiction. Blough's claim that the application of res judicata denies him due process has no merit, because he had notice and an opportunity to be heard in the 1998 case."

RESPONSE

The Order of the district court (App. A-9) states that Blough failed to plead his Fifth Amendment claim in the prior litigation; however the respective court chose to ignore the following facts as presented by Blough:

> The claim of constitutional tort was raised and admitted into the court record as the "underlying claim" during the hearing of February 26, 1999 (App. B at 10, 13, 19-20); raised by the motion to amend which was properly filed with the court and involved in the prior complaint (App. B-29, 33, 40); referenced in the motion to amend the prior complaint to include a claim under Rehabilitation Act of 1973 (App. B-38, 47); and referenced in Blough's response to Government's motion for summary judgment (App. B-50).
>
> The Order by the district court (App. A at 26) was limited to the alleged violations under Title VII of the Civil Rights Act of 1964, as amended, (App. A -36) and the motion to amend the prior complaint to include violations under the Rehabilitation Act of 1973 (App. B-21, 25, 47). The prior Order by the district court was therefore flawed on its face, in that the initial paragraph involves a document (App. B-40) filed in support of the motion to amend for claim of constitutional tort (App. B-29) and in response to Government's motion in opposition to said motion (App. B-33); however the Order by the district court failed to adjudicate the motion to amend for the claim of constitutional tort (App. B-29, 40). The claim of constitutional tort was not subsumed in the claim of civil rights violations based upon the restriction of *Brown v. General Services Administration,* supra. due to the exception

provided under section 712 Title VII of the Civil Rights Act of 1964 and the differing legal standards referenced in *Washingtin v. Davis*, supra. No "final order" has been issued "on the merits" of Blough's the claim of constitutional tort.

The decisions in *Montana v. United States*, 440 U.S. 147 (1979) and *Ragsdale v. Rubbermaid, Inc.*, supra, were based upon the premise, before any other considerations, that the relevant party has "had a full and fair opportunity to litigate". This Court has repeatedly recognized the absolute necessity that the party against whom the earlier decision is asserted must have been afforded a full and fair opportunity to litigate that issue in the earlier case. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). The *opportunity* to be heard is a fundamental requirement of procedural due process. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Blough was denied a full and fair opportunity to litigate in the earlier case and therefore the doctrine of res judicata does not apply to the current litigation (App. A-1, A-9). Redetermination of issues is warranted if there is reason to doubt the fairness of procedures followed in prior litigation, *Montana*, supra. at 165.

C. "The district court correctly granted summary judgment to the defendants, based upon res judicata, because (1) Blough's Fifth Amendment claims in this case involved the same nucleus of operative fact as the claims in his 1998 case and were brought, or could have been brought, either in his 1998 case's original complaint or by amendment by right to the 1998 complaint."

RESPONSE

The Eleventh Circuit has taken the legal position that the facts constitute the cause of action and are therefore the means to an end for purposes of res

judicata. *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999). This position is in conflict with the analysis presented by this Court in *Baltimore S. S. CO. et al v. Phillips*, 274 U.S. 316 (1927).

> "Res judicata depends upon whether the second action or suit is upon the same or a different cause of action. 'A party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor', *Stark v. Starr*, 94 U.S. 477. A cause of action does not consist of facts, but the unlawful violation of a right which the facts show. The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.'"* *Baltimore S. S. Co. et al. v. Phillips*, 274 U.S. 316 (1927) (citing *Chobanian v. Washburn Wire Co.*, 33 R. I. 289, 302, 80A. 394, 400).

> "In the Eleventh Circuit, '[t]he principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form.' *Citibank*, 904 F.2d at 1503 (citations omitted). "It is now said, in general, that if a case arises out of the same nucleus of operative facts, or is based upon the same factual predicate, as the former action, that the two cases are really

the same 'claim' or 'cause of action' for purposes of res judicata." *Id.* Ragsdale v. Rubbermaid, Inc., supra.

Title VII was enacted pursuant to the commerce clause of the constitution and was not intended to incorporate and particularize the commands of the Fifth Amendment. *United Steelworkers, Etc. v. Weber*, 443 U.S. 193, 208, (1979). The cause of action adjudicated in the prior litigation (discrimination under Title VII sections 704 and 717 of the Civil Rights Act of 1964, as amended; and the Rehabilitation Act of 1973) is not the same cause of action raised by amendment in the prior litigation and asserted in the current litigation (violation of Blough's constitutional rights under the Fifth Amendment).

In the case at point, the cause of action under Title VII/Rehab Act of 1973 and the cause of action under the constitution did involve the same parties and are based upon the same nucleus of operative facts. The same factor (i.e. threats of physical injury) provides two legal wrongs (causes of action) under the analysis of *Baltimore S. S. CO. et al v. Phillips,* supra; each with differing legal standards of review as required in *Washington v. Davis*, supra, at 248. Employment related threats are also cognizable under Title VII, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Both causes of action were raised by Blough in the prior litigation; however the decisions by the district court and the appellate court were limited to the cause of action (legal wrong) under Title VII of the Civil Rights Act of 1964, as amended, and the Rehabilitation Act of 1973 (App. A at 8, 24).

Blough has been denied due process in the judicial abstention to litigation of a specific legal right, (questions number one and two as presented to this Court), which is distinct from the legal right

adjudicated by the lower courts. Blough was therefore free to initiate the current action based upon the same nucleus of operative facts without res adjudicata effect.

CONCLUSION

The "national debt" is not measured in dollars, but rather in the number of lives lost and lives crippled in service to America by its veterans. With the exception of the memorial obligation to those who lost their lives in service to their country; the American public has no greater debt than to the totally disabled veterans.

In *Arver v. United States,* 245 U.S. 366 (1918) this Court recognized a constitutional obligation compelling military service pursuant to the authority of Congress to declare war. Congress has established an extensive array of statutory rights (Public Law 78-359: Veterans Preference Act of 1944 and Public Law 85-857: Veterans Benefits) in recognition of the reciprocal obligation to veterans.

The exercise of the war powers is subject to the guarantees of the Fifth Amendment. *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146 (1919)(citing *United States v. Russell*, S.C.,13 Wall. 623, 627). The exercise of war powers by the Federal Government did impose substantial pain and sacrifice upon the lives and liberties of totally disabled veterans which remains with them for the remainder of their lives; as does the special relation to the Federal Government and the debt of the American public. The guarantees of the Fifth Amendment attach to the continuing liability for those sacrifices which cannot be made whole and provide recourse to the totally disabled veteran for additional injuries which sicken the heart, soul and conscious of America.

This Court is called upon to recognize an implied promise (obligation) of the constitution conferring rights specific to the status of totally disabled veterans. The implied promise (obligation) exists within the constitution and was created by the exercise of powers specific to the constitution. This Court is also called upon to recognize specific Fifth Amendment rights inherent to status of America's one hundred sixty thousand totally disabled veterans. They have an unrestricted constitutional right which prohibits employment related threats of physical injury, discrimination and retaliation by the same Government which put them in harms way under the provisions of the constitution. They also have a constitutional right not to be subject to the abuse of judicial authority by the Federal courts.

Recognition of the constitutional obligation conferring rights specific to totally disabled veterans is presented as questions number one and three. As this Court recognized the constitutional obligation (implied promise) to Fifth Amendment rights in *United States v. Russell*, supra.; so may this Court in the case of totally disabled veterans, in that the rights are provided for within the exception of section 712 to Title VII of the Civil Rights Act of 1964, as amended; and the obligation within the Constitution.

The judgment under appeal (App. A at 1-8) contains the following disclaimer:

> "We do not address Blough's arguments regarding whether Title VII of the Civil Rights Act provides the exclusive remedy for disabled veterans with claims of discrimination in federal employment or whether the Fifth Amendment provided Blough a remedy, because those issues are moot in light of the fact the district court correctly granted summary judgment to the

defendants on res judicata grounds."

Questions number one and two provide a case in controversy to which the United States is a party under Article 3, section 2, cl. 1 of the Constitution.

Questions number one and two are questions of law which were presented to the lower courts without response. Grounds not passed on by court of appeals but argued in Supreme Court orally and in the briefs would be considered by Supreme Court granting certiorari, where such grounds raised only issues of law not calling for examination or appraisal of evidence. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). The following facts; which were documented by Blough in the current litigation and admitted by Government in the prior litigation ; are judicially complete such as to warrant a decision on the questions of law presented:

A) Blough is a combat disabled veteran recognized as totally disabled by the Department of Veterans Affairs. Blough has two artificial legs and loss of use of one hand as a result of service in Vietnam (App. B-1).

B) Blough has been employed by Government since 1979 as an Internal Revenue Agent (App. B-3).

If this Courts remands without a decision as to questions number one and two, the Government will again move for summary judgment based upon this Courts decision in *Brown v. General Services Administration*, supra. The inferred judicial limitation of section 717 as stated by the Supreme Court in *Brown v. General Services Administration,* supra, is subject to modification by this Court alone. Section 712 of Title VII was not referenced in *Brown v. General Services Administration*, supra, and therefore was not

a fact in consideration by this Court. All Federal circuits have ruled that Fifth Amendment claims are precluded because Title VII is the exclusive remedy for federal employees based upon *Brown v. General Services Administration*, supra; however no court has considered the section 712 exception as presented.

A final judgment on the merits of Blough's complaint of constitutional tort (questions number one and two), which was raised and involved in the prior litigation, has not been rendered by a court of competent jurisdiction as required by *Southern Pacific R. Co. v. United States*, 168 U.S. 1 (1897) and therefore has no res judicata effect upon the current litigation. *Sears, Roebuck & Co. v. Mackey*, supra; *G. & C. Merriam Co. v. Saalfield and Ogilivie*, supra.

WHEREFORE, Blough respectfully requests that this Court remand this case to the lower courts with proper instruction and positive resolution to these questions of law which are of national significance in addressing the constitutional obligation to protect the inherent Fifth Amendment rights of totally disabled veterans.

Respectfully submitted.

Melvin E. Blough pro se

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(813) 651-3158

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI

No. _____

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
United States Department of the Treasury,
Paul H. O'Neill, Secretary of the Treasury,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Volume A

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 22 2001
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16546
Non-Argument Calendar

D.C. Docket No. 00-01631-CV-T-26E

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
DEPARTMENT OF TREASURY,
PAUL O'NEILL, Secretary of the Treasury,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(May 22, 2001)

Before BIRCH, CARNES and Barkett, Circuit Judges.

PER CURIAM:

Melvin E. Blough, proceeding pro se, appeals the district court's grant of summary judgment, based on the doctrine of res judicata, to the defendants in his civil rights action for an alleged violation of his Fifth Amendment rights.

Blough argues that the doctrine of res judicata was wrongly applied because, although his previous 1998 case, upon which res judicata was based, and this case involved the same parties and same nucleus of operative fact, the district court in the 1998 case denied as moot his motion to amend his complaint to add the Fifth Amendment claims of unconstitutional threats, harassment, and retaliation, and thus, he never had an opportunity to litigate those claims. Blough argues that application of the doctrine of res judicata deprived him of due process and reflected disparate treatment because of his pro se status. Blough additionally argues that under the Fifth Amendment he possess an actionable liberty interest in being free from threats of physical injury, discrimination, and retaliation by the United States and that Title VII of the Civil Rights Act, the basis of his 1998 cause of action, does not provide the exclusive remedy, for disabled veterans, for claims of discrimination in federal employment. Finally, he argues that, in the 1998 case, the district court violated his due process rights by summarily denying his motion to amend his complaint to add his Fifth Amendment claims and that this Court violated his due process rights by affirming the district court.

We review de novo a decision barring a claim on the basis of res judicata. See Ragsdale v.Rubbermaid, 193 F.3d 1235, 1237 (11th Cir. 1999), cert. denied, 530 U.S. 1223 (2000).

We have reviewed Blough's complaint, the proceedings in the 1998 case as contained in the record, and all other relevant portions of the record. Having considered these documents together with the parties' briefs, we find no reversible error.

As a preliminary matter, we do not address Blough's contention that he was denied due process by the district court and this Court in his 1998 case, the 1998 case is not properly before this Court. We do not address Blough's arguments regarding whether Title VII of the Civil Rights Act provides the exclusive remedy for disabled veterans with claims of discrimination in federal employment, or whether the Fifth Amendment provided Blough a remedy, because those issues are moot in light of the fact the district court correctly granted summary judgment to the defendants on res judicata grounds.

The district court correctly granted summary judgment to the defendants, based upon res judicata, because (1) Blough's Fifth Amendment claims in this case involve the same nucleus of operative fact as the claims in his 1998 case and were brought, or could have been brought, either in his 1998 case's original complaint or by amendment by right to the 1998 complaint; (2) Blough admitted that this case and the 1998 case involved the same parties or those in privity with them; and, (3) his 1998 case was decided against him by a final order on the merits by a court of competent jurisdiction. Blough's claim that the application of res judicata denies him due propcess has no merit, because he had notice and an opportunity to be heard in the 1998 case. His contention that the doctrine of res judicata has been applied disparately against him as a pro se party also lacks merit; the doctrine would be applied in the same manner to the facts of this case if he were proceeding with counsel.

AFFIRMED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 22 2001
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16546

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

USA,
DEPARTMENT OF THE TREASURY,
PAUL O'NEILL, Secretary of the Treasury,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: BIRCH, CARNES and BARKETT, Circuit Judges.

BY THE COURT:

Appellant's motion to certify certain questions to the United States Supreme Court, which is contained within the Petition for Hearing En Banc, is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 07 2001
THOMAS K. KAHN
CLERK

No. 00-16546-FF

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

USA,
DEPARTMENT OF THE TREASURY,
PAUL O'NEILL, Secretary of
the Treasury,

Defendants-Appellees.

On Petition for Hearing En Banc from the
United States District Court for the
Middle District of Florida

BEFORE: BIRCH, CARNES and BARKETT, Circuit Judges.

No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

"S/CARNES"
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

For the Eleventh Circuit

No. 00-16546

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 22, 2001
THOMAS K. KAHN
CLERK

District Court Docket No.
00-01631-CV-T-26E

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
DEPARTMENT OF THE TREASURY,
PAUL O'NEILL, Secretary of
the Treasury,

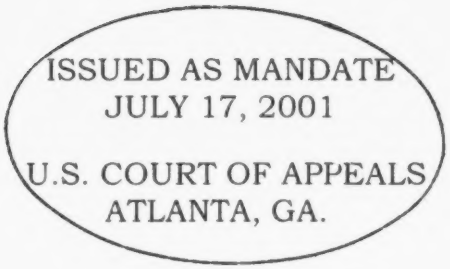
Defendants-Appellees.

Appeal from the United States district Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: May 22, 2001
For the Court: Thomas K. Kahn, Clerk
By: Meoli, Anthony


ISSUED AS MANDATE
JULY 17, 2001
U.S. COURT OF APPEALS
ATLANTA, GA.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
00 NOV 21 AM11:59
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

MELVIN E. BLOUGH,

Plaintiff,

v. CASE NO:8:00-cv-1631-T-26E

UNITED STATES OF AMERICA, UNITED STATES DEP'T OF THE TREASURY, LAWRENCE SUMMERS, Secretary of the Treasury,

Defendants.

_____/

ORDER

Before the Court is the Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and Incorporated Memorandum of Law (Dkt. 8), which was converted into a Motion for Summary Judgment (Dkt.9). The Plaintiff has filed a Response to Defendant's (sic) Motion for Summary Judgment as Provided Under Court Order of October 17, 2000 (Dkt. 10). After carefully considering the submissions of the parties, the Court concludes that the Defendants' Motion for Summary Judgment should be granted.

As gleaned from the parties' submissions, the material facts are undisputed. The Plaintiff filed a lawsuit on June 29, 1998, against the Secretary of the Treasury in Case Number 98-1358-Civ-T-24-E alleging

a cause of action for retaliation pursuant to Title VII of the Civil Rights Act of 1964. See Defendants' Exhibit 1. As noted by the Defendants, and as confirmed by a reading of the complaint filed in that case, the basis of the Plaintiff's claim "was premised upon allegations of retaliation for Plaintiff's complaints to the Department of the Treasury and the Equal Employment Opportunity Commission concerning alleged intemperate conduct by Plaintiff's former supervisor, Ron Prowler." The Court finds it significant that, as reflected on page 17 of Plaintiff's Document 32 attached to his Response, the Plaintiff acknowledged in court on February 26, 1999, that the basis for his "claim is that they violated my Fifth Amendment right to liberty."

The district judge assigned to the earlier case eventually granted summary judgment for the Secretary of the Treasury on September 16, 1999. See Defendants' Exhibit 2. In that order, the district judge also denied the Plaintiff's motion to amend the complaint in which he sought to add claims for retaliation under the American With Disabilities Act and the Rehabilitation Act of 1973. The Plaintiff appealed and the Eleventh Circuit Court of Appeals in an unpublished opinion issued May 9, 2000, affirmed both the grant of summary judgment and the denial of the motion to amend complaint. See Defendants' Exhibit 3. The mandate did not issue, however, until October 10, 2000. See Dkt. 116 in Case Number 98-1358.

The Plaintiff filed the instant lawsuit on August 8, 2000 (Dkt. 1). In the Court's view, although the Plaintiff has attempted to recast his claim as a constitutional tort based on the Fifth Amendment, there is no question that the operative events relied upon by the Plaintiff in initiating this latest action are the same events at issue in the prior action. Indeed,

the Plaintiff does not contend otherwise. His only contention is that "[n]either the district court nor the appellate court have ruled on the merits of this complaint of constitutional tort... which was properly filed in conjunction with the initial complaint..." See"page 2 of Plaintiff's Response.

Against this backdrop of materially undisputed facts, the Defendants argue that the doctrine of *res judicata* precludes the Plaintiff from bringing this latest action in view of the adverse resolution he suffered in the prior action. They are correct. Under this doctrine, a Plaintiff may not pursue claims which were actually raised or could have been raised in a prior suit on the merits when there is a final judgment in the prior suit, the decision in the prior suit was rendered by a court of competent jurisdiction, the parties, or those in privity with them, are identical in both suits, and both suits involve the same cause of action. See Ragsdale v. Rubbermaid, Inc., 193 F. 3d 1235, 1238 (11th Cir. 1999). As to the latter element, it is now clear in the Eleventh Circuit, "that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." Citibank, N.A. v. Data Lease Financial Corp., 904 F. 2d 1498, 1503 (11th Cir. 1990).

In this case, given the undisputed facts, there can be no question that the four elements of *res judicata* have been satisfied. First, this case and the prior case involve the same cause of action because they clearly arise from the same nucleus of operative fact and rely on the same factual predicate. Moreover, as the Plaintiff has conceded, the claim he asserts in this case was always a part of the claim he asserted in the prior case.* Second, the parties to the two lawsuits obviously enjoy legal identity.** Finally, the prior

lawsuit was resolved against the Plaintiff by the entry of a final judgment on the merits by a court of competent jurisdiction.

In this Court's judgment, what the Plaintiff is seeking in this latest lawsuit is a "second bite at the apple" because of his dissatisfaction with the outcome of the earlier lawsuit. However, to allow the Plaintiff to pursue this latest case in light of the outcome of the earlier case would run afoul of the underlying purpose of the doctrine of *res judicata* which is to prevent the expense and vexation attending multiple lawsuits, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions. See Ragsdale, 193 F. 3d at 1238 (quoting Montana v. United States, 99 S. Ct. 970 (1979).

ACCORDINGLY, for the reasons expressed, *** it is **ORDERED AND ADJUDGED** as follows:

* Even if this were not, it is manifestly clear from the record that the Plaintiff was well aware of this so-called constitutional tort claim based on the Fifth Amendment at the very inception of the earlier case and, therefore, could easily have raised it in that case.

** As the Defendants correctly observe, the parties to both suits are the Plaintiff and the United States.

*** Because the Court agrees that *res judicata* mandates the entry of summary judgment for the Defendants, it need not reach the alternative argument advanced by the Defendants for summary judgment.

1) The Defendants' Motion for Summary Judgment (Dkt. 8) is granted.

2) The Defendants' Motion to Dismiss (Dkt. 8) is denied as moot.

3) The Clerk is directed to enter judgment for the Defendants.

4) The Clerk is directed to close this case.

DONE AND ORDERED at Tampa, Florida, on November 20, 2000.

"S/Richard A. Lazzara"
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 99-2435 and 99-13735
Non-Argument Calendar

D.C. Docket No. 98-01358-CV-T-24E

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY- 9 2000
THOMAS K. KAHN
CLERK

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(May 9, 2000)

Before EDMONDSON, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

Melvin E. Blough appeals the district court's denial of his motion for a preliminary injunction and grant of summary judgment in favor of the defendant in his pro se retaliation action, brought under Title VII, 42 U.S.C. section 2000e-1-17. He also appeals the district court's denial of his motion to amend his complaint. Blough failed to establish irreparable injury and the likelihood of success on the merits of his underlying claim and, therefore, the district court properly denied the preliminary injunction. Moreover, in the light of the district court's disposition of the case, the preliminary injunction issue is moot. Blough failed to meet his burden in establishing a prima facie claim of retaliation or that the defendant's nondiscriminatory reasons for its "adverse action" (assigning him, as an IRS agent, to audit only small entities) were pretextual. Summary judgment for the defendant, therefore, was proper. The district court also did not abuse its discretion when it denied Blough's motion to amend his complaint.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-2435 and 99-13735-FF

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 26 2000
THOMAS K. KAHN
CLERK

MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d__).

BEFORE: EDMONDSON, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

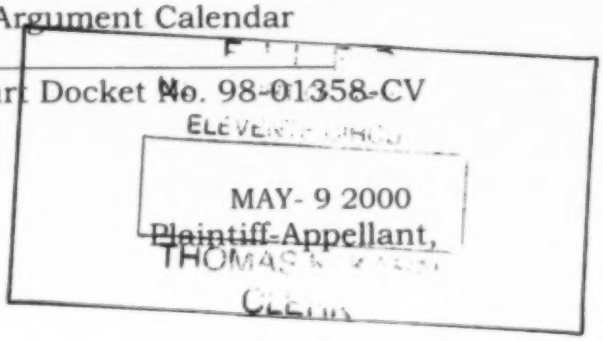
"S/J. L. Edmondson"
UNITED STATES CIRCUIT JUDGE

ORD-42

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 99-2435 and 99-13735
Non-Argument Calendar

District Court Docket No. 98-01358-CV



MELVIN E. BLOUGH,

Plaintiff-Appellant,

versus

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

Before EDMONDSON, BLACK and MARCUS, Circuit Judges.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the

judgments of the said District Court in these causes be and the same are hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed in accordance with Fed.R.App.P.39.

Entered: May 9, 2000
For the Court: Thomas K. Kahn, Clerk

By: "S/Karen McHale"
Deputy Clerk

ISSUED AS MANDATE: OCT 10 2000

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED

99 SEP 17 PM 1:15

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

MELVIN E. BLOUGH,

Plaintiff,

v. Case No. 98-1358-C.V.-T-24(E)

ROBERT E. RUBIN,
Secretary of the Treasury,

Defendant.

_____/

ORDER

This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107). Also before the Court is plaintiff's Motion to Amend Complaint (Doc. No. 33) and defendant's response in opposition (Doc. No. 36). Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. Nos. 104 and 105.

I. Background

Plaintiff filed the instant action against the defendant pursuant to Title VII of the Civil Rights Act of 1964. Plaintiff alleges employment discrimination based on reprisal for prior complaints he made to his

agency and to the Eqwual Employment Opportunity Commission ("EEOC").

Plaintiff is a GS-13 revenue agent employed by the Internal Revenue Service. Plaintiff is responsible for conducting audits of tax-exempt organizations. In October of 1993, plaintiff filed an administrative claim of employment discrimination. Apparently, plaintiff's complaint was founded on the alleged behavior of his supervisor (Ron Prowler), which took place prior to October 1, 1991. Prowler ceased to be plaintiff's supervisor in October of 1991, and plaintiff has not been under Prowler's supervision since then. In mid-1995, plaintiff made a formal request that he not be required to work under Ron Prowler's supervision at any time.

In September, 1995, Prowler is alleged to have made a physical threat against plaintiff while speaking to another IRS employee. In response, plaintiff filed another administrative claim of discrimination, which was unsuccessful.

In October of 1997, the Employee Plans/Exempt Organizations Division in which plaintiff works re-organized, and a new "group" was created to handle all coordinated examination program audits ('CEP Audits"). Ron Prowler was assigned to supervise the new group ("Group 7214"). Group 7214 handles all CEP Audits in Florida. Not being a member of Group 7214, plaintiff does not work on CEP cases in Florida due to the fact that Group 7214 is supervised by Prowler. Plaintiff continues to work as a GS-13 revenue agent, and receives the same pay and benefits that he would receive if he were a member of Group 7214, or if he otherwise worked on CEP Audits in Florida.

The crux of plaintiff's claim is that due to the fact that he is de facto excluded from working in Group 7214 (and thus on CEP Audits) due to Prowler's supervision of the group, he is entitled to relief under Title VII. Specifically, plaintiff alleges that the re-organization which led to the creation of Group 7214 and Prowler's appointment as supervisor of Group 7214 was done in retaliation against him for his prior administrative and EEOC complaints. Although plaintiff concedes that he has not received a reduction in pay, pay grade, benefits, or any other pecuniary losses, he contends that adverse employment action was taken against him due to the fact that he is now "limited to [auditing] the lowest priority and smallest tax-exempt entities."

II. Standard for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law " Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Clark v. Coats & Clark, Inc., 929 F. 2d 604 (11th Cir. 1991). When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most

favorable to the non-movant and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F. 2d 256 (11th Cir. 1989); Samples on behalf of Samples v. City of Atlanta, 846 F. 2d 1328, 1330 (11th Cir. 1988).

III. Discussion

As stated, plaintiff's claim is one for retaliation under Title VII of the Civil Rights Act of 1964. However, plaintiff has sought leave to amend his complaint to add claims for retaliation under the American With Disabilities Act ("ADA") and the Rehabilitation Act of 1973 ("Rehab. Act"). Without reaching the merits of plaintiff's motion to amend, the Court noted that a retaliation claim under the ADA and Rehab. Act are evaluated using the same framework as a claim of retaliation under Title VII. See, Griffin v. GTE Florida, Inc., 182 F. 3d 1279 (11th Cir. 1999). Therefore, the Court's decision on the instant motion for summary judgment would be the same under Title VII, the ADA, or the Rehab. Act.

To establish a prima facie case of retaliation, a plaintiff must show: (1) a statutorily protected expression; (2) adverse employment action; and (3) a causal link between the protected expression and the adverse action. See Stewart v. Happy Herman's Chesire Bridge, Inc., 117 F. 3d 1278, 1287 (11th Cir. 1997). Once a plaintiff has established a prima facie case, the defendant must come forward with a legitimate reason for the employment action to negate the inference of retaliation. See Taylor v. Ruynon, 175 F. 3d 861, 868 (11th Cir. 1999). If the defendant does so, the plaintiff bears the burden of proof that the defendant's offered reasons are pretextual. See id.

In this case, neither party seems to disagree that plaintiff has engaged in protected activity under Title

VII during his tenure at the IRS. Rather, it is the two remaining elements of plaintiff's prima facie case which are disputed.

A. Adverse Employment Action

Defendant contends that the undisputed facts show that no adverse employment action was taken against the plaintiff. As discussed, plaintiff concedes that he has not received a reduction in pay, pay grade, benefits, or any other pecuniary losses. Rather, he contends that adverse employment action was taken against him due to the fact that he is now "limited to [auditing] the lowest priority and smallest tax-exempt entities."

In Wideman v. Wal-Mart Stores, Inc., 141 F3d 1453 (11th Cir. 19980, the court held that retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. In fact, the court rejected the argument that "adverse employment action" must be activity such as discharge, demotion, or failure to hire. Thus, the fact that plaintiff is being limited to auditing the lowest priority and smallest tax-exempt entities could be considered adverse employment action for the purpose of Title VII.

B. Causal Relation

To establish the causal relation element of this prima facie case, plaintiff must show that the protected activity and the adverse action are not completely unrelated. See Wideman, 141 F. 3d at 1457. One particular factor which may tend to prove or disprove a causal link in a retaliation case is the amount of time between the protected activity and the adverse employment action. See Donnellon v. Fruehauf Corp., 794 F. 2d 598, 601 (11th Cir. 1986).

In this case, the span of time between plaintiff's last protected activity (the December 1995 complaint) and the adverse employment action (the October 1997 formation of Group 7214 under Prowler's supervision) is almost two years. This fact, in-and-of itself, belies any assertion of a causal link between the protected activity and the adverse action. Futhermore, it is an undisputed fact that the impetus for the "Group 7214 decision" lies in a prior decision made by the national IRS office in 1997 which directed the "Southeast Key District" to handle cases arising in other districts. See Declaration of Deane Cox at 3. It is also an undisputed fact that prior to the formation of group 7214, Prowler was the only group manager in Florida with supervisory authority over CEP cases, and that his assignment to Group 7214 was a lateral, non-competitive transfer. See id. at 4. Thus, given the record evidence as a whole, there is no material disputed facts which tend to show any casual link between the protected activity asserted and the adverse employment action as stated. For this reason, plaintiff has failed to state a prima facie case of retaliation.

C. Legitimate Reason and Pretext

Even assuming that plaintiff has stated a prima facie case, his retaliation claim still must fail. Defendant has offered a legitimate, non-discriminatory reason for the "adverse employment action" at issue. Namely, defendant has pointed to undisputed records evidence which shows that Group 7214 was formed and put under Prowler's supervision as a response to a mandate issued by the IRS's national office in 1997. See Declaration of Deane Cox at 3-4. Defendant has also pointed to undisputed record evidence which establishes that deviation from the standard CEP procedure requires national office approval and is cumbersome, and has thus stated a legitimate reason

for not excluding cases from the CEP program so that plaintiff can work on them in his current assignment. See id. at 5.

With defendant's non-discriminatory reasons stated, plaintiff has failed to point to a shred of evidence which shows or that even tends to show that defendant's reasons are pretextual. Instead, plaintiff merely restates his allegations, and would have the Court believe that such an elaborate and multi-faceted re-organization of an IRS division took place as an effort to discriminate against him. While not impossible, not one piece of record evidence supports plaintiff's theory.

Accordingly, it is ORDERED AND ADJUDGED that defendant's Motion for Summary Judgment (Doc. No. 75) is GRANTED. The Clerk is instructed to CLOSE Case No. 98-1358-Civ.-T-24(E). Plaintiff's Motion to Amend Complaint (Doc. No. 33) is DENIED for the reasons set forth in this Order. All other motions pending in this action are DENIED AS MOOT.

DONE AND ORDERED at Tampa, Florida, this 16th day of September, 1999.

"S/Susan C. Bucklew"
SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record
Courtroom Deputy

CONSTITUTIONAL PROVISIONS, PUBLIC LAWS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article 1. section 8. The Congress shall have power -

To declare war:

To raise and support armies:

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

Article 3. section 2, clause 1. Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ... to Controversies to which the United States shall be a Party ...

AMENDMENTS TO THE CONSTITUTION

The Fifth Amendment to the United States Constitution provides in part that "no person shall be ... deprived of life, liberty, or property, without due process of law ...." U.S. Const. amend V.

PUBLIC LAWS AND STATUTES

PUBLIC LAW 78-359
(June 27, 1944)
"Veterans' Preference Act of 1944"

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from the preference eligible any **rights** heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

PUBLIC LAW 85-857
(Sept. 2, 1958)
"Veterans' Benefits"

Title 38 U.S.C., Part II, Chapter 11:

Compensation for Service-Connected Disability or Death.

Subchapter II - Wartim eDisability Compensation

Sec. 310. Basic entitlement. For disability resulting from personal injury suffered or disease contacted in line of duty..... in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled ..... compensation as provided in this subchapter.

Sec. 314. Rates of wartime disability compensation. For the purpose of section 310 of this title -

(j) if and while the disability is rated as total the monthly compensation shall be $225;

TITLE 38 UNITED STATES CODE
(2000)
Veterans Benefits
Part II, Chapter 11:

Compensation for Service-Connected Disability or Death.

Subchapter II - Wartim eDisability Compensation.

Sec. 1110. Basic entitlement. For disability resulting from personal injury suffered or disease contracted inline of duty .... in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled ..... compensation as provided in this subchapter...

Sec. 1114. Rates of wartime disability compensation. For the purpose of section 1110 of this title -

(j) if and while the disability is rated as total the monthly compensation shall be $2,036;

CIVIL RIGHTS ACT OF 1964
Senate Report (Judiciary Committee) No. 872
Feb. 10, 1964 [To accompany S. 1732]
House Report (Judiciary Committee) No. 914
Nov. 20, 1963 [To accompany H.R. 7152]
Cong. Record Vol. 110 (1964)

Section 713 provides that this title will not repeal or modify any Federal, State, territorial, or local law creating special **rights** for veterans.

PUBLIC LAW 88-352
(July 2, 1964)
"Civil Rights Act of 1964"

TITLE VII --- EQUAL EMPLOYMENT OPPORTUNITY

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special **rights** or preference for veterans.

PUBLIC LAW 92-261
(March 24, 1972)
"Equal Employment Opportunity Act of 1972"

Sec. 11. Title VII of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new section:

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 717. (a) All personnel actions affecting employees ....., in executive agencies as defined in section 105 of title 5, United States Code, ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

TITLE 42 UNITED STATES CODE
(2000)
The Public Health and Welfare
Chapter 21 - Civi lRights

Subchapter VI - Equa lEmployment Opportunities

Sec. 2000e-11. Veterans special **rights** or preference

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special **rights** or preference for veterans.

Sec. 2000e-16. Employment by Federal Government

(a) All personnel actions affecting employees ..... in executive agencies as defined in section 105 of title 5 ..... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

TITLE 28 UNITED STATES CODE

Judiciary and Judicial Procedure

Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 1291. Final decisions of district courts

The courts of appeal ..... shall have jurisdiction of appeals from all final decisions of the district courts of the United States...

Section 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15 (a) Amendments. A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served ... Otherwise a party may amend the party's pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading ..... within 10 days after service of the amended pleading.

Rule 54(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10. Considerations Governing Review on Certiorari

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States court of appeals .... has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power...

(c) A United States court of appeals .... has decided an important federal question in a way that conflicts with relevant decisions of this Court.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED

98 JUN 29 AM 8:30

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Melvin E. Blough

Plaintiff

Case No. 98-1358Civ-T-24E

V.

Robert E. Rubin, Secretary of the Treasury

Defendant

COMPLAINT

1. PLAINTIFF:

   Melvin E. Blough
   803 Tomahawk Trail
   Brandon, FL 33511

2. Defendant:

   Robert E. Rubin, Secretary of the Treasury
   United States Department of the Treasury
   Office of Equal Employment Opportunity Program
   Building Annex Room 510
   1500 Pennsylvania Avenue, N.W.
   Washington, D.C. 20220

3. JURISDICTIONAL PLEA:

This employment discrimination action is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended. Jurisdiction is specifically conferred on this Court by 42 U.S.C. 2000e-5(f). Equitable and other relief is sought under 42 U.S.C. 2000e-5(g).

4. ALLEGATION:

The United States Government Department of the Treasury (Defendant/employer) has engaged in the unlawful and unconscionable employment practice of threatening physical injury to a disabled veteran (Plaintiff/employee) and continues said practice in retaliating against the Plaintiff/employee for filing a discrimination complaint with the U.S. Equal Employment Opportunity Commission (EEOC).

5. DISCRIMINATORY CONDUCT OF DEFENDANT (EMPLOYER):

42 U.S.C. 1997d Prohibition of Retaliation - No person reporting conditions which may constitute a violation under this subchapter shall be subject to retaliation in any manner for so reporting.

An employee who files formal charges with the EEOC against the employer is assured legal recourse under section 704(a) of Title VII of the Civil Rights Act of 1964 against any action taken in retaliation by the employer.

6. FACTS IN SUPPORT OF ALLEGATION:

Plaintiff is currently and has been an employee (Internal Revenue Agent) of the Defendant for nineteen years. Plaintiff, who has never been the

subject of disciplinary action by the Defendant, has consistently received outstanding annual performance evaluations and commendations from the Department of Justice/National Office Internal Revenue Service.

Plaintiff is a disabled Viet Nam veteran with two artifical legs and the loss of use of one hand.

THREATS

In 1991 an IRS manager (Ron Prowler) did threaten Plaintiff with physical injury when Plaintiff refused his request for a listing of confidential informants. Plaintiff reported the threat to the Division Chief (Terry Hallihan); however no disciplinary actions are known to have been taken against Mr. Prowler. Plaintiff had no further contact with Mr. Prowler and did not pursue the matter.

On September 18, 1995 Plaintiff notified (verbally and in writing) the new Division Chief (Pat Cox) of the previous threat by Mr. Prowler and requested that Mr. Prowler not be assigned supervisory authority over Plaintiff.

On September 21, 1995 Mr. Prowler met with Plaintiffs (then) current manager (Genny Farley) and reportedly went into a long dissertation on how much he hated Plaintiff and stated "he would push (Plaintiff) down a flight of stairs if he thought he could get away with it". Ms. Farley was concerned over the safety of Plaintiff and immediately informed Plaintiff of the threat. Ms. Farley reportedly informed the Division Chief a few days later. Plaintiff called the IRS Inspection Service and was informed that nothing could be done unless Mr. Prowler assaulted Plaintiff. When Plaintiff inquired as to the possibility of obtaining a

civil restraining order the Inspectors response was that the Hillsborough County Court wouldn't get involved in a Federal matter.

Again, no disciplinary actions are known to have been taken against Mr. Prowler.

On December 19, 1995 Plaintiff filed a discrimination complaint under 29 CFR PART 1614 with the Department of the Treasury (Agency). Plaintiff's complaint was not accepted by the Agency and the EEOC affirmed the dismissal of the complaint on the following basis -

"a complaint must point to an 'injury in fact' in order to be aggrieved. Simple conjecture as to alleged future injury is not sufficient". Altimus v. Department of Defense, EEO Request NO. 05920768, 93 feor 3267 (EEOC COMM.1993).

RETALIATION

Effective October 1, 1997 Mr. Prowler received a promotion which resulted in a demotion for Plaintiff in his assigned duties (no effect upon compensation). Plaintiff was informed in writing by the Division Chief (Pat Cox) that the only way Plaintiff would be permitted to continue conducting examinations of the largest and most complex entities was to make application to work for Mr. Prowler.

On November 18, 1997 Plaintiff filed a second descrimination complaint with the Agency under 29 CFR PART 1614 based upon a claim of retaliation by IRS management for the initial complaint filed with the EEOC.

The second discrimination complaint (Retaliation), which was accepted by the Agency, is directly and transactionally related to the initial discrimination complaint in that the Defendant ignored and accepted the threats by Mr. Prowler against Plaintiff and then maliciously required Plaintiff to work under the supervision of Mr. Prowler if he wished to perform the same types of examinations which he had conducted under the supervision of other managers during the period February 1989 through September 1997.

Since October 1, 1997 Plaintiff has been assigned the equivalent of one months work which was limited to the examination of very small entities.

The Defendants prohibited retaliatory action has taken form in the manipulation of Plaintiffs employment conditions (assignments/duties) such as to constitute harrassment.

The record clearly demonstrates that were it not for the appointment of Mr. Prowler as the manager of those employees conducting examinations of the largest and most complex entities, Plaintiff would not have been excluded from said examinations. Plaintiff has therefore suffered a personal loss or harm with respect to a condition of employment.

CONCLUSION

Plaintiff continues to fear the violent nature of Mr. Prowler. If a person with two artifical legs and loss of use of one hand is pushed down a flight of stairs that person would be seriously injured and possibility killed.

The threats by Mr. Prowler and the protection afforded him by the defendant have taken a toll

upon Plaintiff both mentally and physicially over the past seven years. Mr. Prowler works in Ft. Lauderdale and Plaintiff works in St. Petersburg. Defendant addressed the threat made in 1995 by taking administrative procedures to insure that Mr. Prowler had very limited contact with the Plaintiff. Plaintiff did make written requests of Defendant to avoid all contact with Mr. Prowler; however said requests were denied by Defendant.

The Agency and the EEOC did not have an effective complaint procedure to address threats against Plaintiff. This is evidenced by the failure of the defendant to address the reported direct and indirect threats by Mr. Prowler against Plaintiff and the conclusion of the Agency/EEOC that "there must be an injury in fact". The failure of the Defendant to address the reported threats and the conclusion rendered by the Agency/EEOC are properly viewed in the light of the June 26, 1998 United States Supreme Court decision in Burlington v. Ellerth. In the case at point, Defendant had knowledge of the threats by Mr. Prowler and blatantly retaliated against Plaintiff such are to constitute harrassment.

7. CURRENT STATUS OF DISCRIMINATION COMPLAINT FILED WITH AGENCY:

The Agency has failed to timely bring final action on said complaint of descrimination. Plaintiff therefore initiates civil action as provided in section 2000e-5. (42 U.S.C. 2000e-16(c)).

In correspondence dated April 15, 1998 Plaintiff was notified by Agency that investigation was complete. On April 21, 1998 Plaintiff did request a final decision from the Agency in accordance with 29 CFR section 1614.110 of the EEOC Regulations.

The sixty day period specified in section 1614.110 has expired without a final decision by the Agency.

Plaintiff is not an attorney and apologizes to the Court, which is burdened with a heavy case load, for the necessity to bring this action.

8. If relief is not granted, Plaintiff will be irreparably denied rights by Title VII of the Civil Rights Act of 1964, as amended.

9. WHEREFORE, Plaintiff prays that the Court grant such relief as may be appropriate, including injunctive orders, damages, costs, and attorney's fees.

"S/Melvin E. Blough" pro se

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803 Tomahawk Trail
Brandon, FL 33511
(813) 651-2778

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

V. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION

Plaintiff requests permission of the Court to file an additional memorandum in support of the motion for preliminary injunction for the purpose of providing a record and stating Plaintiff's position in advance of the scheduled hearing.

This motion does not alter the nature of the relief requested in the motion for a preliminary injunction. Permission is requested in the interest of fully considering the motion for a preliminary injunction.

In Haines v Kerner, 92 S CT 594 (1972) the United States Supreme Court did note that the pleadings of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. Plaintiff is uncertain if this request is subject to the administrative provisions of M. D. Fla. R. 3.01(a) or

4.06(b) and therefore relies upon a determination by this Court. Plaintiff has no objection to a continuance of the scheduled hearing to March 5, 1999 (or a later date at the convenience of the Court) if the Court deems it necessary.

RELEVANT LEGAL STANDARDS FOR AND APPLICATIONS OF INJUNCTIVE RELIEF

1. Sampson v. Murry, 94 S. Ct. 937 (1974)

   Use of the district court's injunctive power in cases of discharge of probationary employees should be reserved for the genuinely extraordinary situation rather than the routine case.

   Considering the disruptive effect that the g ran tof temporary relief here was likely to have on the administrative process, and in view of the historical denial of all equitable relief by federal courts in disputes involving discharge of Government employees; the well - established rule that the Gover nment be granted the widest latitude in handling its own internal affairs; and the traditional unwillingness of equity courts to enforce personal service contracts, the Court of Appeals erred in routinely applying the traditional standards governing more orthodox "stays," and respondent at the very least must show irreparable injury sufficient in kind and degree to override the foregoing factors.

2. Canal Authority of State of Florida v. Callaway, CA 5 Cir. (1974) 489 F.2d 567

   Prerequisites for grant of pre liminary injunction are: substantial likelihood that plaintiff will prevail on the merits, substantial threat that plaintiff will suffer irreparable injury if injunction is not granted, threatened injury to plaintiff outweighing threatened harm injunction may do to defendant and absence of

disservice to the public interest if the injunction should be granted.

Only those injuries that cannot be redressed by application of a judicial remedy after hearing on the merits can properly justify a preliminary injun ction.

Preliminary injunction should not be issued to protect status quo unless court's ability to render meaningful decision on merits would otherwise be in jeopardy.

If currently existing status quo itself is causing one of parties to suit irreparable injury, it may be necessary to alter situation by grant of preliminary injunction so as to prevent injury, thereby returning to last uncontested status qou between parties, or by allowing parties to take proposed action that court finds will minimize irreoarable injury; focus always must be on prevention of injury by proper order, not merely on preservation of status quo.

3. Parks v. Dunlop, CA 5 Cir. (1975) 517 F. 2d 785

Central purpose of a preliminary injunction is to prevent irreparable harm; it is the threat of harm which cannot be undone which authorizes exercise of the court's equitable power to enjoin before the merits are fully determined.

4. Gonzalez v. Chasen, U.S.D.C. Puerto Rico (1980) 506 F. Supp. 990

While equity will not ordinarily attempt to control discretion, discretionary powers of public officers which are exercised arbitrarily, maliciously, in bad faith, and without a right purpose are unlawful, and one suffering irreparable injury from such acts may have them enjoined.

5. Stromfeld v. Smith, USDC S.D. New York (1983) 557 F. Supp. 995

Harm that can be remedied monetarily does not qualify as irreparable, for purposes of temporary injunctive relief.

Federal employee challenging action of federal agency must establish higher degree of harm for temporary injunctive relief, and must show that "extraordinary" harm will result if interm relief is denied.

Though court has obligation to enjoin governmental action that violates applicable statutes, federal employees, to obtain temporary injunctive relief, must demonstrate irreparable harm outweighing government interest in unfettered internal regulation.

6. Pope v. Bond, D.C.D.C. (1985) 613 F. Supp. 708

Only "adverse actions" are appealable by public employee to the Merit Systems Protection Board.

7. Snyder v. Sullivan, S. Ct. Co. (1985) 705 P.2d 510

"Injunction" is generally preventive and protective remedy, aimed at future acts, and is not intended to redress past wrongs.

8. Nichols v. Frank, D.Or. (1991) 771 F. Supp. 1075

Title VII sexual harassment plaintiff was not entitled to injunction ordering that discrimination to which she had been subjected by her supervisor not be repeated absent demonstration of likelihood that she would be forced to return to post office where supervisor was employed or that she would be placed in situation where harassment was likely to be repeated.

RELEVANT LEGAL STANDARDS FOR AND APPLICATIONS OF CONSTITUTIONAL RIGHTS

Constitution of the United StatesAmendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1. Bell v. Hood, 66 S. Ct. 777

   "The very essence of civil liberty," wrote Mr. Chief Justice Marshall in Marbury v. Madison, 5 U.S. 137, 163, 1Cranch 137, 163, 2 L.Ed. 60 (1803), "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Traditionally, therefore, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.

2. Hovey v. Elliott, 17 S. Ct. 841 (1897)

   Denial of Right to Defend – Du eProcess of Law:

   The principle, stated in this terse language, lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted.

3. Chicago, B. & Q. R. Co. v. McGrire, 31 S. Ct. 259 (1911)

In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. What differences, as to the extent of this power, may exist with respect to particular employments, and how far that which may be authorized as to one department of activity may appear to be arbitrary in another, must be dtermined as cases are presented for decision.

4. Palko v. State of Connecticut, 58 S. Ct. 149 (1937)

The Fifth Amendment is not directed to the States, but solely to the federal government.

5. Bolling v. Sharpe, 74 S. Ct. 693 (1954)

The concepts of equal protection of the laws and due process both stem from the American ideal of fairness, and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law, but a discrimination may nevertheless be so unjustifiable as to be violative of due process.

The term "liberty" within the Fifth Amendment to the Federal Constitution is not confined to mere freedom from bodily restraint, but it extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper government objective.

6. Fuentes v. Shevin, 92 S. Ct. 1983 (1972)

Central meaning of "procedural due process" is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified.

No later hearing and no damage award can undo fact that arbitrary taking that was subject to right of procedural due process has already occurred.

Relative weight of liberty or property interests is relevant to form of notice and hearing required by due process before deprivation of such liberty or interest, but some form of notice and hearing, formal or informal, is required before deprivation of property interests that cannot be characterized as de minimus.

6. Perry v. Golub, USDC Alabama, (1975) 400 F. Supp. 409

Where federal officer's "permanent reassignment" was to silence his protests against irregularities and to punish him for not heeding instructions to "leave it alone" and where decision to reassign was arbitrary and an abuse of administrative discretion and was taken without any of the prerequisite procedural safeguards required by administrative regulations, there was infringement of officer's First Amendment and Fifth Amendment rights.

8. Washington v. Davis, 96 S. Ct. 2040 (1976)

"We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. "

9. Davis v. Passman, 99 S. Ct. 2264 (1979)

One of the important objects of the Federal Constitution is the designation of rights and, in its great outlines, the judiciary is clearly discernible as the primary means through which these rights may be enforced.

"The term 'cause of action' as used in this case, refers to whether a plaintiff is a member of a class of litigants that may, as a matter of law, appropriately invoke the power of the court. Since petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment, claiming that her rights under that Amendment have been violated and she has no effective means other than the judiciary to vindicate these rights, she is an appropriate party to invoke the District Court's general federal – question jurisdiction to seek relief, and she therefore has a cause of action under the Fifth Amendment.

The Fifth Amendment provides that ' no person shall be ..... deprived of life, liberty, or property, without due process of law ....'. In numerous decisions, this Court ' has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."

10. City of Springfield, Mass. v.. Kibbe, 107 S. Ct. 1114 (1987)

"The Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See, e.g., Oklahoma City v. Tuttle, 471 U.S., at 824-825, n. 8, 105 S. Ct., at 2436, n. 8 (requiring 'affirmative link' between municipal policy and constitutional violation); Polk County v. Dodson, 454 U.S. 312, 102 s. Ct. 445, 70 L.Ed.2d 509 (1981) (municipal policy must be 'moving force' behind constitutional deprivation). In Monell v. New York City Dept. of Social Services, 98 S. Ct. 2018 (1978) the policy at issue commanded the deprivation of

constitutional rights. The causal link between the municipal policy and the constitutional vio lation therefore was readily apparent: no 'evidence was needed other than a statement of the policy by the municipal corporation, and its exercise."

11. Fela v. U.S. Merit Systems Protection Bd., N.D. Ohio (1989) 730 F. Supp. 779

Due Process Clause of Fifth Amendment is a limitation on arbitrary authority.

12. Bank of Jackson County v. Cherry , 11 th. Cir. (1993) 980 F.2d. 1362

" A. Due Process Claim

The government may not deprive any person of 'life, liberty or property without due process of law .'

To prevail upon its procedural due process claim, BJC must establish: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. See Lehr v. Robertson, 103 S. Ct. 2985, 2900 (1983).

1. Property Interest

A property interest must rest upon 'a legitimate claim of entitlement.' Roth, 92 S. Ct. at 2709.

2. Liberty Interest

Liberty interests are both broader and more difficult to define than property interests. As the Supreme Court stated nearly seventy years ago: Liberty denotes not merely freedom from bodily restraint, but also the right of the individual to .....enjoy those privileges long recognized as es sential to the orderly pursuit of happiness by free men. Meyer v.

Nebraska, 43 S. Ct. 625 (1923). 'In a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed." Roth, supra.

13. Holmes v. U.S., M.D. Ala. (1994) 868 F. Supp. 1348

"More recently, in Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991), the Supreme Court held that imposing liability upon an employer, under an apparent authority theory, for an employee's fraudulent acts did not violate the employer's due process rights. The Court recognized imposing liability on the party who is in a position 'to guard substantially against the evil to be prevented' creates a strong incentive for vigilance by that party."

14. McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir.) 1994

The court held that substantive due process rights differ from procedural due process rights in the manner in which a violation of those rights occur:

"A violation of a substantive due process right, for instance, is complete when it occurs; hence, the availability vel non of an adequate post-deprivation state remedy is irrelevant. Because the right is 'fundamental,' no amount of process can justify its infringement. By contrast, a procedural due process violation is not complete 'unless and until the State fails to provide due process."

15. Women Prisoners of D.C. Dept. of Corr. v. D.C., D.D.C. (1995) 899 f. Supp. 659

Common method of proving a threat of future tort to be prevented by injunction is by proving past tort under conditions that render its repetition or continuance probable, but it is not necessary to issuance of injunction to prove past wrong.

16. Washington v. Glucksberg, 117 S. Ct. 2258 (1997)

Due process clause guarantees more than fair process, and "liberty" it protects includes more than absence of physical restraint.

Due process clause provides heightened protection against government interference with certain fundamental rights and liberty interests.

"We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices.

But we 'have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.' Collins, 503 U.S., at 125, 112 S. Ct., at 1068. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' id., at 503, 97 S. Ct., at 1938 (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty,' such as that 'neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937). Second, we have required in substantive-due-process cases a 'careful

description' of the asserted fundamental liberty interest. Flores, supra, at 302, 113 S. Ct., at 1447; Collins, supra, at 125, 112 S. Ct., at 1068; Cruzan, supra, at 277-278, 110 S. Ct., at 2850-2851. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking," Collins, supra, at 125, 112 S. Ct., at 1068, that direct and restrain our exposition of the Due Process Clause. As we stated recently in Flores, the Fourteenth Amendment ' forbids the government to infringe ..... 'fundamental' liberty interests at all, no matter what process is provide, u nless the infringement is narrowly tailored to serve a compelling state interest. " 507 U.S. at 302, 113 S. Ct., at 1447.

RELEVANT LEGAL STANDARDS FOR AND APPLICATIONS OFIRREPARABLE INJURY

1. City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983)

   Emotional consequences of prior act are not sufficient basis for injunctive relief absent real and immediate threat of future injury by defendant, though emotional up-set is relevant consideration in damages action.

   The "capable-of-repetition," doctrine applies only where named plaintiff can make reasonable showing that he will again be subjected to the alleged illegality.

   Equity remedy of injunction was unavailable absent showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that plaintiff will be wronged again.

2. Goldie's Bookstore v. Super. Ct. of State of Cal. CA 9 th Cir. (1984) 739 F.2d 466

   Speculative injury does not constitute irreparable injury sufficient to warrant granting of preliminary injunction.

Alleged constitutional infringement will often alone constitute irreparable harm sufficient to warrant granting of preliminary injunction.

3. Hohe v. Casey, CA 3rd Cir. (1989), 868 F.2d 69

"It is 'purposeful unconstitutional (government) suppression of speech (which) constitutes irreparable harm for preliminary injunction purposes.' Goldie's Bookstore v. Superior Ct., 739 F.2d 466, 472 (9th Cir. 1984). Accordingly, it is the 'direct penalization, as opposed to incidental inhibition, of First Amendment rights (which) constitute irreparable injury.' Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir.1983); see Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1997). Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction. See City of Los Angelesv. Lyons, 461 U.S. 95, 112 -13, 103 s. Ct. 1660, 1671, 75 L.Ed.2d 675 (1983).

RELEVANT LEGAL STANDARDS FOR AND APPLICATIONS TO MERITS OF COMPLAINT

1. CONGRESSIONAL RECORD – SENATE, JUNE 19, 1964:

THE CIVIL RIGHTS ACT

The following comments were provide by Senator McCarthy of Minnesota:

"These rights were claimed on the basis of the nature of man and the nature of a person. All of these rights to which we now refer today, on another occasion were declared to be inalienable rights of all men. These civil rights do not derive because of law but, rather, derive from the very nature of man himself. They have their basis and they rest in that nature. We have made these basic human

rights civil rights, and we have sought to guarantee and protect them through the Constitution of the United States and of the States, and through the laws of the land.

2. PUBLIC LAW 88-352 (JULY 2, 1964)
TITLE VII – EQUA LEMPLOYMENT OPPORTUNITY

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees ..... because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investi gation, proceeding, or hearing under this title.

VETERANS PREFERENCE

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

3. International Bro. of Teamsters v. United States, 97 S. Ct. 1843 (1977),

" Disparate treatment such as is alleged in the present case is the most ea sily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be i nferre d from the mere fact of differences in treatment. See, e.g., Arlington Heights v. Metroplitan Housing Dev. Corp., 429 U.S. 252, 265 -266, 97 S. Ct. 555, 563-565, 50 L.Ed.2d 450. Undoubtedly disparate treatment was the most obvious evil Congress had

in mind when it enacted Title VII. See, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey)."

4. Cox v. American Cast Iron Pipe Co., 11th Cir. (1986), 784 F.2d 1546

Job titles and duties themselves are conditions of employment protected by Title VII, and thus, Title VII plaintiff does not have to show economic loss to prove discrimination.

5. Harris v. Forklift Systems, Inc. , 114 S. Ct. 367 (1993)

Title VII's prohibition against discrimination with respect to "terms, conditions, or privileges of employment" based on race, color, religion, sex, or national origin is not limited to economic or
tangible discrimination, but extends to entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in discriminatory hostile or abusive environment.

Mertor standard for determining whether conduct is actionable under Title VII as "abusive work environment" harassment requires objectively hostile or abusive environment – on ethat reasonable person would find hostile or abusive – a swell as victim's subjective perception that environment is abusive; conduct that is not severe or pervasive enough to create objectively ostile or abusive environment is beyond Title VII's purview, as is conduct that victim does not subjectively perceive as abusive.

To be actionable under Title VII as "abusive work environment" harassment, conduct need not seriously affect employee's psychological well-being or lead employee to suffer injury, so long as environment would reasonably be perceived, and is perceived, as hostile or abusive; focusing on employee's psychological well-being or whether employee suffered injury could unnecessarily focus fact finder's attention on concrete psychological harm, which Titl eVII does not require.

Whether work environment is "hostile" or "abusive" in violation of Title VII can be determined looking only at all the circumstances, which may include frequency of discriminatory conduct, its severity, whether it is ph ysically threatening or humiliating, or merely offensive, and whether it unreasonably interferes with employee's work performance; effect on employee's psychological well -being is relevant in determining whether victim actually found environment abusive, but that factor, like any other relevant factor, may be taken into account and no single factor is required.

6. Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998)

When employee proves that tangible employment action resulted from refusal to submit to supervisor's sexual demands, he or she establishes that employment decision itself constitutes change in terms and conditions of employment that is actionable under Title VII; however, for any sexual harassment preceding employment decision to be actionable, conduct must be severe or pervasive.

Employer may be liable for both negligent and intentional torts committed by employee within scope of his or her employment.

Employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.

Tangible employment action taken by supervisor becomes for Title VII purposes the act of employer.

Employer is subject to vicarious liability to victimized employee for actionable hostile environment crea ted by supervisor with immediate (or successively higher) authority over employee; when no tangible employment action is taken, employer may raise affirmative defense

to liability or damages, subject to proof by preponderance of the evidence.

Employer's affirmative defense to vicarious liability for supervisor's creation of hostile work environment comprises two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise. Employer has no affirmative defense to vicarious liability for supervisor's harassing conduct in violation of Title VII when supervisor's harassment culminates in tangible employment action, such as discharge, demotion, or undesirable reassignment.

DOCUMENTATION UPON WHICH PLAINTIFF INTENDS TO RELY FOR INJUNCTIVE RELIEF

Rules of the United States District Court for the Middle District of Florida:

Preliminary Injunctions - Rul e4.06(b)

In order to develop a record and the positions of the parties in advance of the hearing –

(2) Service of all papers and affidavits upon which the moving party intends to rely must be made .....

Speed is often extremely important in proceedings for restraining orders and temporary injunctions, and both the movant and the opposing party are often unable to obtain and marshal their evidence in a manner that would be proper for a summary judgment hearing or for an actual trial ..... But the court may properly consider affidavits at preliminary injunction hearings which do not measure up to the standards of

the summary judgment affidavits. Kennedy v. Sheet Metal Workers Int. Ass'n Local 108, D.C. Cal. (1968) 289 F. Supp. 65 .

In addition to the standards for injunctive relief presented in *Canal Authority of State of Florida v. Callaway* ; Plaintiff will present documentation in support of the "genuinely extraordinary situation" and "irreparable injury" standards as presented by the United States Supreme Court in *Sampson v. Murry* ; and the "capable-of-repetition" doctrine as presented in *City of Los Angles v. Lyons.*

EXCERPTS FROM COMPLAINT FILED WITH THIS COURT

Plaintiff is currently and has been an employee (Internal Revenue Agent) of the Defendant for nineteen years. Plaintiff, who has never been the subject of disciplinary action by the Defendant, has consistently received outstanding annual performance evaluations and commendations from the Department of Justice/National Office Internal Revenue Service. See Exhibit A.

In 1991 an IRS manager (Ron Prowler) did threaten Plaintiff with physical injury when Plaintiff refused his request for a listing of confidential informants. Plaintiff reported the threat to the Division Chief (Terry Hallihan). See Exhibit B.

Additional comments:

1. Mr. Prowler became violent without provocation and was continuously shouting at Plaintiff as he put his fist in front of Plaintiff's face and backed Plaintiff against a row of file cabinets September 23, 1991.

2. Another person was present during a portion of the incident on September 23, 1991 and will testify as to Mr. Prowlers demeanor and what Mr. Prowler was demanding a copy of. This person will be deposed during the discovery process.

3. The National Treasury Employees Union Chapter President became involved with internal revenue service management subsequent to the incident and relevant documentation will be subpoenaed by Plaintiff.

4. Mr. Prowler called Plaintiff within two days of the incident and apologized for his actions which he described as "inappropriate". Please refer to Exhibit C (EEOC decision dated 12/5/96) which indicates that Mr. Prowler apologized for the incident.

5. Plaintiff will at this point correct some misrepresentations contained in Defendant's Memorandum in Support of its Response to Plaintiff's Application for Preliminary Injunction - Par tA :

   a. The examination of the "high profile taxpayer" was initiated in 1988 (not 1991).

   b. Mr. Prowler did not discover the database. He was advised of said database during a four days conference in January, 1991 at which Plaintiff was the instructor.

   c. Mr. Prowler could not have "believed the data base to be an improper one". Internal revenue service National Office Disclosure

Litigation had reviewed the database on a number of occasions and determined it to be completely proper. This will be confirmed by the Disclosure Office in Atlanta during the discovery process.

d. Plaintiff never refused access to the database to Mr. Prowler or any other internal revenue service persons. As Plaintiff explained to Mr. Prowler on 9/23/91, he would be provided a copy of the database absent the confidential informants.

6. Mr. Prowler came to the Division in 1990 and Plaintiff only met or talked to him on four or five occasions prior to 9/23/91. Plaintiff was generally on the road and his contact person on the "high profile taxpayer" was Bill Pheil per instructions of the Division Chief. Mr. Prowler was never involved in the examination. Plaintiff was very much surprised by Mr. Prowler's violent behavior on 9/23/91 as Plaintiff didn't know him and he didn't know Plaintiff..

   Plaintiff has been in contact the Division Chief who worked directly with Plaintiff in the examination of the "high profile taxpayer" from 1988 to 1991. He will testify as to the positive working relationship which did exist throughout the period.

7. Mr. Prowler's predetermined replacement as group manager (Melanie Clark) was a good friend of Mr. Prowler's having worked together in Miami. Ms. Clark's attitude toward Plaintiff changed after the 9/23/91 incident and she harassed Plaintiff until her resignation as group manager in December 1993. On October 14, 1993 Plaintiff did file a complaint of employment

discrimination against Mr. Prowler and Ms. Clark; however the complaint was withdrawn in December 1993 upon the resignation of Ms. Clark. Plaintiff incorrectly assumed that Mr. Prowler wouldn't be able to get to him once Ms. Clark was gone.

During the years 1991, 1992, 1993 Plaintiff was assigned very small grade 13 examination by Mr. Prowler and Ms. Clark (i.e. minimun gross receipts and assets). No large and complex examinations were assigned to Plaintiff.

On September 18, 1995 Plaintiff notified (verbally and in writing) the new Division Chief (Pat Cox) of the previous threat by Mr. Prowler and requested that Mr. Prowler not be assigned supervisory authority over Plaintiff.

On September 21, 1995 Mr. Prowler met with Plaintiff's (then) current Manager (Genny Farley) and reportedly went into a long dissertation on how much he hated Plaintiff and stated "he would push (Plaintiff) down a flight of stairs if he thought he could get away with it". Ms. Farley was concerned over the safety of Plaintiff and immediately informed Plaintiff of the threat. Ms. Farley reportedly informed the Division Chief a few days later. Plaintiff called the internal revenue service Inspection Service and was informed that nothing could be done unless Mr. Prowler assaulted Plaintiff.

On December 19, 1995 Plaintiff filed a discrimination complaint under 29 CFR PART 1614 with the Department of the Treasury (Agency). Plaintiff's complaint was not accepted by the Agency and the EEOC affirmed the dismissal of the complaint on the following basis -

"a complainant must point to an 'injury in fact' in order to be aggrieved. Simple conjecture as to alleged future injury is not sufficient".

Additional comments:

1. The memorandums and correspondence in Exhibit C reflect Plaintiff's concerns relative to the direct and indirect threats by Mr. Prowler. The comments by Mr. Prowler and the concerns/ actions of Ms. Farley will be presented upon discovery; however it should be noted that Ms. Farley has already made a statement relative to the threatening comments by Mr. Prowler against Plaintiff (EEOC decision 12/5/96 in Exhibit C). The comments by Ms. Farley will also be affirmed by the Union Steward, the EEO Counselor, and the Plaintiff.

2. On 10/1/95 Plaintiff was transferred to another group such that he would not be under the direction and control of Mr. Prowler. Plaintiff again incorrectly assumed that Mr. Prowler would not be able to get to him.

Plaintiff did make written requests of Defendant to avoid all contact with Mr. Prowler; however said requests were denied by Defendant. **See Exhibit D.**

Effective October 1, 1997 Mr. Prowler received a promotion which resulted in a demotion for Plaintiff in his assigned duties (no effect upon

compensation). Plaintiff was informed in writing by the Division Chief (Pat Cox) that the only way Plaintiff would be permitted to continue conducting examinations of the largest and most complex entities was to make application to work for Mr. Prowler.

On November 18, 1997 Plaintiff filed a third discrimination complaint with the Agency under 29 CFR PART 1614 based upon a claim of retaliation by internal revenue service management for the 1995 complaint filed with the EEOC.

The third discrimination complaint (retaliation), which was accepted by the Agency, is directly and transactionally related to the initial discrimination complaints in that the Defendant ignored and accepted the threats by Mr. Prowler against Plaintiff and then maliciously required Plaintiff to work under the supervision of Mr. Prowler if he wished to perform the same types of examinations which he had conducted under the supervision of other managers during the period February 1989 through September 1997. See Exhibit E.

Since October 1, 1997 Plaintiff has been assigned the equivalent of one months work which was limited to the examination of very small entities.

The Defendants prohibited retaliatory action has taken form in the manipulation of Plaintiff's employment conditions (assignments/duties) such as to constitute harassment.

The record clearly demonstrates that were it not for the appointment of Mr. Prowler as the

manager of those employees conducting examinations of the largest and most complex entities, Plaintiff would not have been excluded from said examinations. Plaintiff has therefore suffered a personal loss or harm with respect to a condition of employment. See Exhibit F.

Additional comments:

1. From October 1, 1997 to the present Plaintiff has been working under the direction and control of Teresita M. Rodriguez. Prior to 1990 Ms. Rodriguez worked for Mr. Prowler in another Division of the internal revenue service in Miami. In anticipation of becoming the manager of the group conducting examinations of the largest and most complex tax-exempt organizations in Florida, Mr. Prowler did recruit and promote the selection of Ms. Rodriguez to fill the group manager position he was about to vacate.

2. Please refer to the Standard Position Description for Plaintiff's position on March 27, 1989 and March 25, 1998 within Exhibit F. Article 26, Section 3A of the Internal Revenue Service/ National Treasury Employees Union Contracts state that the position description for each position will accurately reflect the actual duties, responsibilities and the supervisory relationships pertaining to the employee filling that position. The Standard Position Descriptions remained unchanged from March 27, 1989 through March 25, 1998 and include the following phrases within the descriptive portion of Plaintiff's duties:

   "Conducts independent examinations of the largest and most complex exempt organizations".

"Prepares the audit plan and acts as team leader in examinations of exempt organizations requiring team audit approach."

3. During the nine (9) year period beginning October 1, 1988 and ending September 30, 1997 Plaintiff did conduct 13,520 hours of examination time. Sixty-three percent (63%) of the examination time was devoted to six Coordinated Examination Program (CEP) qualified examinations (i.e. the largest and most complex). Thirty-one percent (31%) of the examination time was utilized for GS-13 non CEP qualified examinations and tax-exempt bond examinations. The remaining six percent (6%) of examination time was devoted to GS-12 examinations. All the GS-12 examinations and the majority of the small GS-13 examinations were assigned and conducted during 1991, 1992 and 1993.

4. During the period beginning October 1, 1997 to the present; Plaintiff has been assigned a limited number of very small GS-13 examinations under the general examination program. These types of returns have historically proven to have poor audit potential. The average gross receipts of said returns is approximately $5 million. This is in stark contrast to the $400 million to $1 billion in gross receipts at any point over the prior nine (9) year period when Plaintiff was permitted and did conduct examinations of the largest, most complex and most sensitive tax-exempt organizations. Mr. Prowler and Ms. Rodriguez are controlling the cases assigned to Plaintiff just as Mr. Prowler and Ms. Clark did in 1992 and 1993.

I. CONDUCT OF DEFENDANT SUBSEQUENT TO FILING OF COMPLAINT WITH THIS COURT

The Application for Preliminary Injunction and attached documentation reflect upon harassment which Plaintiff believes to have occurred subsequent to the filing of Complaint with this Court. **See Exhibit G.**

GENUINELY EXTRAORDINARY SITUATION

PLAINTIFF/EMPLOYEE

1. **CONGRESSIONAL RECORD – HOUSE, APRIL 17, 1944**

VETERANS PREFERENCE IN THE FEDERAL CIVIL SERVICE

From the very inception of our Republic our Government has extended certain special benefits and privileges to the men who have offered their lives in the defense of the country and its institutions. This is a sound principle. Those who are selected from among us to wear the uniform and to serve the country on the firing line are certainly entitled, when peace has been won through their efforts to be selected and given special consideration and preference by their Government in peacetime. That is a reward to an American who has willingly and gladly offered his life in an effort to save and to sanctify for us the principles of government under which we live, and which by their sterling efforts is being handed on to posterity.

USC TITLE 38 – VETERANS BENEFITS
CHAPTER 41, SECTION 4100: FINDINGS

The Congress makes the following findings:

(1) As long as unemployment and underemployment continue as serious problems among disabled veterans and Vietnam-era veterans, alleviating unemployment and underemployment among such veterans is a national responsibility.

A Copy of most recent Special Unemployment Study is attached as Exhibit H. In addition, please note copies of the most recent Annual Report by the Secretary of Veterans Affairs and the U.S. Census Bureau. The following findings were noted:

a) Persons with Plaintiff's disabilities represent 1% of the work force and only 27% of those persons are employed.

b) Only 2% of the service connected disabled veterans are rated at 100% disabled due to combat related injuries.

c) Veterans with 60% or higher service connected disability rating: 23% employed and 77% unemployed. Within the unemployed, 76% stated that their disability affected their ability to hold a job.

Plaintiff is 100% service connected disabled veteran qualified and receiving Veterans preference under USC Title 5 (Government Organizations and Employees) Subpart A, Chapter 21, section 2108(3)(c). See Exhibit I.

DEFENDANT/EMPLOYER

Please note the discussion of the abusive culture which exists within management at the Internal Revenue Service per testimony of Deputy Assistant Inspector General for Investigation, Department of the Treasury and Chief, Employee and Labor Relations Section, Personnel Branch, internal revenue service. These are not disgruntled employees, but rather Departmental witnesses acknowledging the abusive practices of internal revenue service management at Hearings Before the Committee on Finance United States Senate (April 28, 1998). See Exhibit J.

CONGRESSIONAL RECORD – SENATE, OCTOBER 3, 1997INTERNAL REVENUE SERVICE HEARINGS

The checks and balances system is not just constitutional philosophy. It is a practical safeguard for liberty.

In other words, the checks and balances that our forefathers put into the American system, so that, to get at the first conclusion he made that power corrupts , the understanding of that, the forefathers created a government in which one branch was always looking over the other.

EXCERPTS FROM COMPLAINT FILED WITH THIS COURT

Plaintiff is a disabled Viet Nam veteran with two artifical legs and the loss of use of one hand.

The threats by Mr. Prowler and the protection afforded him by defendant have taken a toll upon Plaintiff both mentally and physicially over the past seven years.

Plaintiff continues to fear the violent nature of Mr. Prowler.

THREAT

A menace; especially, any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent. United states v. French, D.C. Fla., 243 F. 785.

A declaration of one's purpose or intention to work injury to the person, property, or rights of another, with a view of restraining such person's freedom of action. McKenzie v. State, 113 Neb, 576,204 N.W. 60.

The threats by Mr. Prowler against Plaintiff in 1991 and 1995 were very serious. The threats by Mr. Prowler were physical (inflict pain) as opposed to administrative (demotion, suspension, etc.). The threats were directed to Plaintiff's most vulnerable characteristic (i.e. disability). According to the Penalty Guidelines in the Handbook of Employee Conduct and Ethical Behavior Mr. Prowler shold have been reprimanded for the 1991 incident and dismissed for the 1995 incident; however given the culture which existed then and continues to exist within internal revenue service management , he was protected and promoted. Plaintiff has been harassed and retaliated against for reporting the threats. The conduct is consistent with the findings of the Senate Finance Committees relative to the internal revenue service.

CONCLUSION

Plaintiff submits that the required judicial standards have been met to enable the Court to provide injunctive relief:

1. This Complaint reflects a "genuinely extraordinary situation". Irreparable injury sufficient in kind and degree to intercede in the process by which the Government "handles its own affairs" .

   One of the problems Plaintiff is having difficulty with is reconciling the negative effect this Government has had on his life. Thirty years ago Plaintiff fought and paid for his Constitutional right not to be afraid of being injured. Mr. Prowler (acting within the provisions of the abusive management culture within the internal revenue service) did violate Plaintiff's substantive and procedural due process fundamental liberty rights under the provisions of the Fifth Amendment. As a 100% service-connected disabled veteran Plaintiff had a Constitutional right not to be threatened with physical injury under the analysis presented by the United States Supreme Court in *Washington v. Glucksberg.* That right has been violated and neither Defendant nor the Court can eliminate the hurt and anger of the past; however the Court can provide injunctive relief to the future.

   Given the abuses of the past and the failure of the internal revenue service to address them; the statement presented during the Senate Hearings on the Internal Revenue Service provides direction:

   > The checks and balances system is not just constitutional philosophy. It is a practical safeguard for liberty.

2. The merits of the Complaint are well documented and will continue to improve via the discovery process.

3. The American public has an interest in protecting the rights of a 100% disabled veteran.

4. The capable-of-repetition doctrine exists based upon the history of abuse and the internal revenue service management culture which exists. For over seven years Mr. Prowler has either threatened Plaintiff directly or indirectly or used others to harass and retaliate against Plaintiff.

Plaintiff presents the following precedent in response to Defendant's reference to the Merit Systems Protection Board :

Merit Systems Protection Board did not possess subject matter jurisdiction over former Postal Service employee's mixed case appeal regarding his removal from Postal Service where, prior to his appeal to Board, former employee amended civil complaint in district court to include cause of action challenging his removal based on same discrimination allegations. Connor v.. U.S. Postal Service, 15 F.3d. 1063 (Fed. Cir. 1994).

WHEREFORE, Plaintiff respectfully requests permission of this Court to file this additional memorandum in support of the Request for Preliminary Injunction.

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-2778

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION

Plaintiff requests permission of the Court to file an additional memorandum in support of the motion for preliminary injunction for the purpose of providing a record and stating Plaintiff's position in advance of the scheduled hearing.

Respectfully submitted,

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-2778

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been hand delivered to a person authorized to receive on behalf of Assistant United States Attorney Roberta M. Bahnsen at Suite 3200, 400 North Tampa Street, Tampa, FL. this sixteenth day of February, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/Melvin E. Blough" pro se

(2)

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 01 203

AUG - 1 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
United States Department of the Treasury,
Paul H. O'Neill, Secretary of the Treasury,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Volume B

156 pp.

DEPARTMENT OF VETERANS AFFAIRS
Regional Office
PO Box 1437
St Petersburg FL 33731-1437

March 19, 1997

In Reply Refer To:
317/271C-7935
C 25 707 037

Mr. Melvin Blough
803 Tomahawk Trail
Brandon FL 33511

Dear Mr. Blough:

The following certification is furnished for use in determining entitlement to Civil Service Preference for the spouse of a service connected disabled veteran.

This is to certify that the records of the U.S. Department of Veterans Affairs (VA) disclose that Melvin Blough enlisted September 25, 1968, was separated August 31, 1971, from the Armed Forces of the United States and has an existing service connected disability. The percentage and nature of the service connected disability is shown below:

PERCENT	DISABILITY
100%	Amputation, below knee, bilateral
60%	Wound, left upper extremity with fractures of metacarpals and incomplete paralysis, left median nerve, with complete paralysis, left ulnar nerve.

30%	Splenectomy
30%	Recurrent urethral condylomata with urethral stricture, p.o.
20%	Wound, pelvic girdle, mg XV
10%	Laceration, external cutaneous nerve, right thigh
10%	Wound, abdomen with laceration of liver

100 percent Combined Percentage

The veteran is not currently rated as unemployable due to service connected disabilities. The veteran is permanently and totally disabled.

Sincerely yours,

"S/Bill Bryant"
BILL BRYANT
Veterans Services Officer

271C/

Internal Revenue Service **Department of the Treasury**

District Director

477 Michigan Ave.,
Detroit, Michigan 48226

Person to Contact:
Velma VanDuvall
Telephone Number:
(313) 226-7216
Refer Reply to:
RM:P:ERTS
Date:
May 21, 1979

Mr. Melvin Blough
P.O. Box 79
Ypsilanti, Michigan
48197

Dear Mr. Blough:

I am pleased to confirm our commitment to you for the position of Internal Revenue Agent with post-of-duty of Detroit, Michigan. You are scheduled to report for duty to Room 2411 McNamara Building, 477 Michigan Avenue, Detroit, Michigan at 8:00 a.m. on July 9, 1979. Your appointment will be at the GS-7 level with a salary of $13,014 per year. We are looking forward to you joining our organization and hope that your entrance on duty will be the start of a successful career in the federal service.

I wish to point out that your appointment is subject to a satisfactory report of character investigation and satisfactory completion of the training period. In addition, you are required to place yourself at your first post-of-duty at your own expense.

A character investigation conducted by officials of the Service will be initiated prior to your entrance on duty. Therefore, the enclosed papers (or those we have

previously furnished) must be completed and returned as soon as possible. If at all possible we prefer that you return these papers personally so that the information can be reviewed with you and you can be fingerprinted. We suggest that you call Velma VanDuvall in Detroit at 226-7216, to arrange for a date and time for the return of your processing papers. In the event that such an arrangement is not possible, we can complete the necessary negotiations by mail.

As you already know, the training program consists of both classroom and on-the-job training. We must stress the classroom phase is geared to a rapid pace and the trainee must keep pace with the program.

We suggest that you carefully consider the information submitted on the original application. In the event you overlooked any period of employment regardless of duration, any arrests, discharges, or if you have misleading statements relative to reasons for leaving places of employment, you should submit a supplementary statement to your original application. If information received during the preliminary check with employers or references is of a derogatory nature, this commitment will be cancelled.
If you have served on active military duty and/or claim veterans preference, it is necessary that you furnish either a copy of your discharge (DD 214) from the military service or evidence from the military service verifying your periods of active military duty.

You must also furnish a complete transcript showing courses, grades, and completion of your academic studies.

Please acknowledge receipt of this letter by return mail indicating whether or not you are accepting this commitment.

Sincerely yours,

"S/Lee Miller" Chief,
Employment Programs
Section

Attachments

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH, Plaintiff, vs. ROBERT E. RUBIN, Secretary of the Treasury, Defendant.	CASE: 98-1358-CIV-T-24E Tampa, Florida February 26, 1999 8:30 A.M.

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS BEFORE THE HONORABLE SUSAN C. BUCKLEW UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
MELVIN E. BLOUGH
Pro Se
803 Tomahawk Trail
Brandon, Florida 33511
813/651-2778

For the Defendant:
WARREN ZIMMERMAN
United States Attorney's Office
Middle District of Florida
400 Tampa Street, Suite 3200
Tampa, Florida 33602
813/274-6310

Court Reporter: Carol J. Jacobs, RPR, CP
Official Court Reporter
801 N. Florida Avenue
Tampa, Florida 33602
813/301-5024

Proceedings recorded by mechanical stenography; computer-assisted transcription.

(Call to Order of the Court at 8:55 a.m.)

THE COURT: All right. If I could have plaintiff sit to my left and defense counsel sit to my right, please.

The next matter, which is actually set for a hearing on a motion for a preliminary injunction, is -- I'm going to make an attempt to pronounce it, you correct me if I'm wrong -- Blough versus Rubin, Secretary of the Treasury. And this is Civil Case 98-1358.

How do you pronounce your name, sir?

MR. BLOUGH: That's correct.

THE COURT: Blough?

MR. BLOUGH: That's -- Blough.

THE COURT: All right. Mr. Blough, you are appearing pro se and will be representing yourself in this hearing; is that correct?

MR. BLOUGH: That's correct.

THE COURT: Okay. And Mr. Zimmerman, you are here on behalf of the government.

MR. ZIMMERMAN: Yes, Your Honor.

THE COURT: Okay. We have a couple of preliminary matters before we actually begin this hearing.

Mr. ZIMMERMAN, I'll direct my first question to you. There was a document filed by the defendant extending time to respond to plaintiff's request for sanctions. I note this morning, when we ran it, it had been withdrawn. And my first question was going to be what request for sanctions?

MR. ZIMMERMAN: Your Honor, that was the reason it was withdrawn. This case was previously assigned to another assistant who had received in the mail the service of a motion for sanctions under Rule 11 and had not realized that that was merely the service and not the filing of the motion. The plaintiff had properly availed himself of the safe harbor provision of Rule 11. So, in essence, we had erroneously asked to extend the time to respond to something which was not yet ripe or even filed. So we withdrew it.

And if -- I'll talk to Mr. Blough after this hearing and see if that matter can be resolved. If not, I'm sure he'll file it and we'll respond within ten days thereafter.

THE COURT: All right. Let me just ask another question of you. Mr. Blough also filed -- well, filed an initial preliminary injunction and then there was an emergency motion which I considered an additional memorandum to the original preliminary injunction. Subsequent to that time there was a motion for leave to file additional memorandum in support of motion for preliminary injunction, and there was a document --a rather thick document filed. And I just am not entirely comfortable with my docket sheet. Has the government filed anything in response to that motion?

Are you aware of it?

MR. ZIMMERMAN: I have in my possession what appears to be an equally thick document that I assume is the one Your Honor is referring to.

THE COURT: It is titled motion.

MR. ZIMMERMAN: Right. Right. I guess until now I had not realized that this was separate and apart from what I had understood to be his motion to amend his request for preliminary injunction, which the court had treated as just a supplemental memorandum, I guess. Let's put it this way: I don't have any objection to his filing this, if that's the court's inquiry. And I'm prepared to go forward today with oral argument without having filed a written response, unless the court would insist upon a written response.

THE COURT: No. I just wanted to know your position. I'll grant the motion then by the plaintiff for leave to file an additional memorandum in support of the motion for preliminary injunction.

All right. Then, Mr. Blough, I was going to direct a question to you regarding the February 16 th pleading, which is styled motion. But since the government has no objection to your filing that, then it will remain as filed and I think we can proceed.

So that I might tailor this argument just a little bit, it seems that the government has tailored their response to your motion for preliminary injunction and has really keyed in on two issues, two of the four that you must meet in order to obtain a preliminary injunction.

The first is that the government has stated that you have not shown and they don't believe you can show a

substantially likelihood of prevailing on the merits of this claim, or the underlying claim. And the second is that you have failed and cannot show irreparable injury.

So, although there are actually four prongs, as I think you are aware of, I think those are the two where you probably need to concentrate any type of argument or anything else that you want to present this morning.

MR. BLOUGH: Okay. Could I mention something at this time?

THE COURT: Sure.

MR. BLOUGH: The submission on the 16th was actually -- as I read your Local Rule 4.06(b)(1) there, it says five days or -- (b)(2), actually, five days prior to the hearing we shall submit all information that we propose to substantiate our case.

THE COURT: Okay. If you are going to address me, unless you have a problem standing, you'll need to stand; if you do, just tell me.

MR. BLOUGH: Yes. Right. Okay.

THE COURT: Is there any problem?

MR. BLOUGH: No, there is no problem.

THE COURT: Okay.

MR. BLOUGH: So that was in effect a five-day response -- actually, you know, I gave him ten days to respond -- or notice that those were the items that I was going to depend upon at this hearing. And I guess my question is why didn't the government come forward with their response to my response? I mean it

says they have to -- the day before the hearing they are to submit to the court and myself their -- the items that they will--their response to my initial complaint. So I'm wondering what's -- we don't seem to have a -- it wasn't really a motion I was filing. I noted the court on the section page. I said I was uncertain if it was a -- if it was a motion under 301(b) or 406(b).

THE COURT: Okay. We really just -- we don't have all morning to do this. I've deemed it as filed. So I think your argument is moot. The government hasn't filed anything. I'm not sure if they're going to present anything this morning or they're just going to rely on the pleadings as they have been filed, which they are entitled to do as well. So you actually have the burden here.

MR. BLOUGH: Okay. This is my submission, what you have, in support of this preliminary injunction.

THE COURT: I have it.

MR. BLOUGH: Okay. And the question, I'm sorry?

THE COURT: Well, this is your opportunity -- we set it for a hearing so that you could make any type of argument that you wish to make and be heard, if you wish to be heard. If you want to only rely on what you have submitted in your pleadings and the pleadings of February 16th, you can do that as well.

MR. BLOUGH: All right. Okay. In addition to that, I would like to point out, of course, which I just have, the government has not responded. I have made four, basically, allegations of additional harassment after the time I filed my complaint. I don't have a response from the government to those four allegations. And, also, they did attempt to respond to one, but I felt it

was -- there were so many misrepresentations in that response, that" why I asked for sanctions. I asked the counsel for the defendant, that I might actually go for sanctions against that response. And I'm kind of setting here, I don't know what the position of the government is as far as those four allegations. And I think that --

THE COURT: Well, let me ask you -- what I am here on today is a motion for a preliminary injunction. So I -- let me ask you a question: What is the irreparable injury that you will suffer, or you believe you will suffer, if this court does not grant your preliminary injunction this morning?

MR. BLOUGH: I believe it has already happened and I believe it will continue to happen if the court doesn't enter an injunction to protect me from the government --I think what has happened is the agency has become so abusive, Congress stepped in, they restructured the IRS and so forth, and they have done their part. But I'm setting here and I am still receiving this harassment from the government and this discriminatory treatment. And now I'm asking the court to step in.

THE COURT: What is the -- yeah, but that -- you know, that's a part of your lawsuit. In order to get a preliminary injunction, you have got to show irreparable injury. If this court -- in other words, if I don't grant this preliminary injunction, there's going to be something happen to you that can't be made right by monetary damages, for example, cannot be made right by the court at the close of the trial in this matter, some reason --I mean this is a very serious thing that you are asking me to do. I hardly ever grant preliminary injunctions. So you have got to show me that this is a special circumstance that if I don't do this then something is going to happen that I

can't make right or you can't make rightby the lawsuit and the resolution of the lawsuit.

MR. BLOUGH: Right. I understand. I think the test is in the Fifth Amendment, the protection of my liberties. I think I have been deprived of my liberties.

THE COURT: How is it you have been deprived of your liberty or will be deprived of your liberty if I don't grant this?

MR. BLOUGH: Basically they don't have a right -- I'm a totally disabled Vietnam veteran; okay? And I think that the class of Vietnam veterans that are totally physically disabled, there's only 52,000 of us in the whole country, out of 25 million people. We are very, very small. Yet we went and gave something for this country. And I have a right not to expect the federal government, someone within the federal government, to threaten me with physical harm, push me down a flight of stairs. I don't have -- they don't have the right to do harassment, they don't have the right to retaliate against me. They don't have these rights.

THE COURT: What is it you want me to enjoin? What is it you want me to stop?

MR. BLOUGH: I want you to stop the harassment. I want you to stop them from trying to fire me or set me up or whatever it is they are trying to do. If they do so, let them come to you first before they fire me and say this is what we want to do. And if they are right, they are right. But I nned the protection of the court, because I'm setting here alone.

THE COURT: And why is it that you have some -- and I'm not saying by asking this question that even if you have some concerns that you may get fired that's a reason to grant a preliminary injunction, but why is it

that you have a fear that you will be fired if I don't grant this preliminary injunction?

MR. BLOUGH: Well, the four things I mentioned, even after the -- after I filed my lawsuit, I always thought like all citizens, you file a lawsuit, you are under the protection of the court. That's not true. These people will continue doing what they have been doing, because that's their pattern. I can get set up so easy -- easily. And, like, for example, they have access to all of my file cabinets and everything. If they choose to put some marihuana in the file cabinet, lock it up again, I'm stuck, I'm out in the street.

THE COURT: I can't grant a preliminary injunction based on something that you have a fear might happen, such as the example that you have given of planting marihuana in a file cabinet. Otherwise, you know, I would be granting preliminary injunctions in every case where someone had some sort of concern, well-founded or not.

MR. BLOUGH: What if we have a seven-year history of abuse? I think that would go into the matter. And a congressional reputation -- or congressional inquiries into the IRS and their activities. We have a very abusive culture here within the service.

THE COURT: Okay. I need you to be more specific. What is the irreparable injury that you will suffer, something that can't be corrected by this lawsuit, what is the irreparable injury you will suffer if I don't grant this preliminary injunction?

MR. BLOUGH: I don't know if I can make it until November, it is as simple as that.

THE COURT: You mean in -- what do you mean you don't know if you can make it?

MR. BLOUGH: Emotionally, let's say.

THE COURT: I'm sorry, say it again?

MR. BLOUGH: Emotionally.

THE COURT: I'm sure the court reported got that, but I didn't. And I don't have my -- she's not on my real-time.

THE DEFENDANT: Mentally/emotionally, let's say.

THE COURT: Oh, emotionally. Okay. All right. Mr. Blough, can you be more specfic with me?

THE DEFENDANT: No. Well, let's see, I have got a letter in there from a psychiatrist, as far as that is concerned. Nothing else. No, I just need --I need to be safe, I guess. I'm looking for some degree of security from the court, some protection.

THE COURT: Well, is it what you want me to do is to step in and say that you cannot fire Mr. Blough without first seeking permission of this court?

MR. BLOUGH: At least receiving concurrence, I would hope. I mean at least asking for concurrence. Maybe they don't have to -- they don't have to accept your verdict, but at least they could ask. Just take judicial notice, I guess.

THE COURT: And you're concerned that you may be fired?

MR. BLOUGH; I think there are a number of things they have done that would point to that direction, right.

THE COURT: All right. Mr. Zimmerman.

MR. ZIMMERMAN: May it please the court. Your Honor, in essence, Mr. Blough is asking the court to undertake the role of the overseer of the Internal Revenue Service in its personnel function. And of course with all that Your Honor has to do on a daily basis, it would be unrealistic to think that even an injunction as Mr. Blough imagines it would give him much mental or emotional security once he gets out the door and realizes that his job is still his job, he still has to go to work, and good things or bad things might happen, and he really won't be in much of a different situation at all than he would be without the injunction.

The request here is simply too vague. I believe that our Title VII and rehab act juris prudence, with the manner in which it treats retaliation as the equivalent of discrimination, is the greatest injunction, the greatest protection that a plaintiff could ask for. And if at such time Mr. Blough gets notice of some kind of adverse action, then he'll have ample opportunity to protect his rights, and that is that.

I might add that he's a distinguished IRS employee of 20 years with outstanding evaluations. There's no notice of adverse action pending. And, you know, who is anyone or who am I to predict what could happen in the future, but in terms of the standards for granting preliminary injunctive relief, there's no imminent threat of irreparable injury to Mr. Blough, much less a reasonable likelihood that he would even prove the so-called seven-year history or the discrimination that he has alleged in the case.

And for these reasons we would simply ask the court to deny the motion for preliminary injunction and to

allow the case to go forward and for Mr. Blough and me to move the case discovery-wise and get it going.

THE COURT: Mr. Blough, or Mr. Zimmerman, either one, I have set this case for trial when? In November? Is that when it is set?

MR. BLOUGH: Right. That's correct.

THE COURT: All right. You can have a seat. Mr. Blough, do you have anything in response to what Mr. Zimmerman said?

MR. BLOUGH: I think it is a rather simplistic view of the situation. I certainly don't agree with it. I think it is much more serious than they would present. It is as simple as that.

THE COURT: All right. Let me take about a five-minute recess, and then I'll come back and give you my ruling.

THE COURT SECURITY OFFICER: All rise.

(Recess at 9:15 a.m.)

(Call to Order of the Court at 9:25 a.m.)

THE COURT: Mr. Blough, I think I started out by saying a preliminary injunction is an extraordinary remedy and I hardly ever grant them. And that's accurate. Because what it does, it requires the court to prejudge the merits of a lawsuit, because I have to find there's a substantial likelihood of your prevailing, and that's very hard to do early on in any lawsuit. And I also have to find there is irreparable injury. In fact, the law requires that in order to grant it I must find that there is a substantial likelihood of success on the merits, irreparable injury will be suffered

unless injnction issues, the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and if issued the injunction would not be adverse to the public interest.

I think the two issues that we are concerned about this morning are the two issues that I laid out when we started, substantial likelihood of prevailing on the merits and irreparable injury.

I don't discount the fact that you -- this is probably a very emotional situation for you. And, you know, I'm old enough that -- I wasn't there like you were, but I lived through the Vietnam War, and I remember the times. And I have personally a great appreciation for it.

But I'm not going to grant this preliminary injunction. And there's just no basis for me to do it. I don't discount the fact that, as I said, that there is some emotional distress here and that you have a concern that you may be fired or concern that you may be set up. But that is not irreparable injury that the law looks at or the law allows me to grant a preliminary injunction for.

Even if you got fired, that would not legally really be a reason for me to grant a preliminary injunction and say reinstate Mr. Blough. At the end of the lawsuit, that may in fact, if that should have happened, that may in fact be a remedy. At the end of the lawsuit, should you prevail, there may be monetary damages.

But your concern that you may be fired or your concern that you may be set up in one manner or another or you may get disciplinary actions against

you in the future is not a reason to grant a preliminary injunction, because it is not irreparable injury that the law looks at that says, okay, Judge, Court, you need to step in and do something.

I can't oversee an agency or a corporation or anybody that comes before me and is the defendant in an employment discrimination lawsuit. I just can't do it. That's not my job. The law doesn't say that I should do that. And that essentially would be what I would be doing if I granted an injunction and said come to me prior to taking any disciplinary action, come to me prior to writing any report that may be critical of Mr. Blough, come to me prior to changing what assignments you give him. I mean I don't know where it would end. And I just can't do that.

But, at any rate, the reason I'm denying the motion for preliminary injunction is that you have just not shown any irreparable injury. And I don't believe that you can at this stage. Not to mention the fact that there's also not been a showing of substantial likelihood of prevailing on the merits at this point. But my greater concern is the irreparable injury.

So I'm doing to deny the motion for preliminary injunction, finding that the plaintiff has not met his burden as far as irreparable injury and substantial likelihood of prevailing on the merits. And this case will proceed forward to trial in November.

MR. BLOUGH: Your Honor, can I say something?

THE COURT: Yes, sir.

MR. BLOUGH: My basis for claim is that they violated my Fifth Amendment right to liberty. And that's --I think that the Supreme Court, by the analysis in a recent case, would uphold that.

There's a tradition in this country, and you don't do certain things. And one of the things you don't do is you don't tell a disabled veteran with two artificial legs you are going to push him down a flight of stairs. You have taken away my sense of security. You don't have that right to do that. Nobody has that right. And that's all.

THE COURT: Well -- and I don't disagree that, as I said, that there is an emotional distress. It is just that I don't think there is a legal reason or basis for me to grant an injunction.

MR. BLOUGH: Okay.

THE COURT: So the motion is denied. Thank you. I'll enter a written order.

(Thereupon, these proceedings were adjourned at 9:30 a.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

"S/Carol Jacobs" — March 5, 1999
Carol Jacobs — Date

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION TO AMEND COMPLAINT

On June 29, 1998 Plaintiff did file a Complaint with this Court providing a claim under the Civil Rights Act of 1964 (42 U.S.C 2000e-5, 2000e-16) against Defendant alleging unlawful intentional discrimination which is prohibited under sections 704 and 717 of the Act (42 U.S.C. 2000e-3(a), 2000e-16(a).

The initial claim is considered de novo in that the Defendant failed to bring timely administrative action as provided in 42 U.S.C. 2000e-16(c) and illustrated in Reynolds v. Wise, U.S.D.C., N.D. Tx, 375 F. Supp. 145 (1974).

Plaintiff respectfully requests that the Court grant this request to amend the Complaint of June 29, 1998 to include a claim of action against Defendant for unlawful intentional discrimination based upon Plaintiff's disabilities. This action which is brought under the Rehabilitation Act of 1973, as amended (29 U.S.C. 701, 791, 794(a), 794(d), 794a(a)(1)) and the Americans with Disabilities Act of 1990 (42 U.S.C. 1211, 12112(a), 12112(b), 12117, 12201, 12203) is brought in addition to the initial action against unlawful intentional employment related discrimination under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

The allegations and facts in support of the allegations as initially stated in the Complaint apply to this action brought under the Rehabilitation Act of 1973, as amended and the Americans with Disabilities Act of 1990.

Jurisdiction is conferred on the Court by 29 U.S.C. 794a (a)(1) and 42 U.S.C. 12117(a).

In addition to the equitable and other relief sought under 42 U.S.C. 2000e-5(g) in the Complaint of June 29, 1998; Plaintiff requests damages for intentional discrimination in employment as provided under 42 U.S.C. 1981a(a)(1)/(a)(2) and 1981a(b)(2)/(b)(3).

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion to amend the Complaint filed with this Court on June 29, 1998.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail

Brandon, FL 33511
(813) 651-2778

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via facsimile (813) 274-6198 and United States certified mail to Assistant United States Attorney Warren Zimmerman (Suite 3200, 400 North Tampa Street, Tampa, FL.) this fifteenth day of March, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMPLAINT TO BRING ACTION UNDER THE REHABILITATION ACT OF 1973, AS AMENDED AND THE AMERICANS WITH DISABILITIES ACT OF 1990

This motion for leave to file in support of a motion pending before the Court is filed under the provisions of Local Rule 3.01(b) and does not alter the nature of the request within the pending motion.

Plaintiff did exhaust the administrative remedies provide by the Department of the Treasury (Defendant/Employer):

A. The complaint of employment related discrimination initially filed with the Department

of the Treasury on November 18, 1997 did contain the following statement:

"The discriminatory retaliation by internal revenue service management against me has violated the internal revenue service's own Reasonable Accommodation Policy Statement (P-1-47) which provides that "Executives, managers and supervisors shall create a positive work environment that will encourage employees with disabilities to maximize and reach their full potential".

B. References to threats of physical abuse by Employer/ Defendant and Employee/Plaintiff's disabilities were prominent throughout the initial complaint filed with the Department of the Treasury.

C. The complaint of employment related discrimination initially filed with the Department of the Treasury did include a copy of the December 5, 1996 decision by the U. S. Equal Employment Opportunity Commission which did provide the causal link to the Complaint of retaliation currently before the Court.

Plaintiff has met the "relation back" doctrine under Rule 15(c)(2) of the Federal Rules of Civil Procedure:

A. The Complaint of employment related discrimination filed with this Court on June 29, 1998 did reference the threats of physical abuse by Employer/ Defendant and the physical disabilities of Employee/Plaintiff.

B. The Complaint before this Court also references the December 5, 1996 decision by the U. S. Equal Employment Opportunity Commission

which provides the causal link to the current complaint of retaliation. The initial paragraph of the December 5, 1996 decision by the U. S. Equal Employment Opportunity Commission reads as follows:

"Appellant filed an appeal with this Commission from a final decision of the agency concerning his complaint of unlawful employment discrimination, in violation of section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. sec. 791 et seq "

The 1995 complaint to the Department of the Treasury, which precipitated the December 5, 1996 EEOC decision was also a mixed complaint in that it did complain of Title VII and Rehabilitation Act violations.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion for leave to file this memorandum in support of the motion to amend complaint to bring action under the Rehabilitation Act of 1973, as amended and the Americans With Disabilities Act of 1990.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-2778

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via facsimile (813) 274-6198 and United States certified mail to Assistant United States Attorney Warren Zimmerman (Suite 3200, 400 North Tampa Street, Tampa, FL.) this tenth day of May, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

PLAINTIFF'S SECOND MOTION FOR LEAVE TO AMEND COMPLAINT UNDER RULE 15 (a) AND TO PRESENT INITIAL DEMAND FOR JURY TRIAL UNDER RULE 38 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

On June 29, 1998 Plaintiff did file a Complaint with this Court providing a claim under the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) against Defendant alleging unlawful intentional discrimination which is prohibited under sections 704 and 717 of the Act (42 U.S.C. 2000e-3(a), 2000e-16(a)).

Plaintiff respectfully requests that the Court grant this request to amend the initial Complaint to include a claim of action against Defendant for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

Jurisdiction is conferred on the Court by 28 U.S.C. section 1331 in that the basis for this amended claim arises under the Federal Constitution.

Title VII of the Civil Rights Act of 1964 is not the exclusive remedy for Plaintiff in that Section 712 of the Act provides that "nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans".

Under the analysis presented by the United States Supreme Court in Washington v. Glucksberg, 117 S. Ct. 2258 (1997) ; a one hundred percent (100%) physically disabled veteran has a fundamental Constitutional right not to be threatened, harassed and retaliated against by the same government which put him in harms way in Viet Nam.

Plaintiff has met the "relation back" doctrine under Rule 15(c)(2) of the Federal Rules of Civil Procedure in that the initial Complaint did reference the fear experienced by Plaintiff and the threats, harassment and retaliation directed to Plaintiff by agents of Defendant since 1991.

"The change in defendants' capacity is not substantial enough to prevent the relation back of the amendment to the date of filing of the original complaint. The basis of plaintiff's claim is that he was illegally discharged. That was the essence of his initial complaint under Title VII and 42 U.S.C. section 1985, and that is the essence of his Fifth Amendment claim now. Certainly an amendment which asserts a claim under a different statute (or under the Constitution instead of a statute) but which arises out of the same conduct relates back to the date of filing of the original

complaint." Tiller v. Atlantic Coast Line R. R. Co., 65 S. Ct. 421 .

The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim. As the United States Supreme Court noted in *N. Y. Central & Hudson River R. R. Co. v. Kinney,* ; ther eis much "identity" between Title VII and Fifth Amendment claims.

Rules 15 of the Federal Rules of Civil Procedure provides that a party may amend a pleading only by leave of the court and leave shall be freely given when justice so requires. The right of trial by jury is provided by the Seventh Amendment to the Constitution.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion for leave to file a pleading to amend the Complaint to bring action under the Fifth Amendment and to present Demand For Jury Trial.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
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(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via facsimile (813) 274-6198 and certified mail to Assistant United States Attorney Warren Zimmerman this ninth day of August, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

ROBERT E. Rubin, Secretary, U.S. Department of the Treasury,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND MOTION FOR LEAVE TO AMEND COMPLAINT AND TO PRESENT INITIAL DEMAND FOR JURY TRIAL, WITH MEMORANDUM OF LAW

Defendant, Robert E. Rubin, Secretary of the Treasury, by and through the undersigned Assistant United States Attorney, hereby opposes plaintiff's second motion for leave to amend complaint and to present initial demand for jury trial (Doc. 97). In support hereof, defendant respectfully presents the following:

MEMORANDUM OF LAW

Plaintiff filed this action against the Secretary of the Treasury pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. The complaint alleges employment discrimination based on reprisal for prior involvement in the protected Equal Employment Opportunity

("EEO") process. Specifically, plaintiff asserts he was retaliated against by management's alleged refusal to permit him to audit tax exempt organizations meeting the criteria for examination under the so-called coordinated examination program ("CEP") of the Internal Revenue Service.*

Plaintiff moved for leave to amend his complaint on or about March 15, 1999 (Doc. 33) seeking to add claims of handicap discrimination under the Rehabilitation Act of 1973, 29 U.S.C. section 794. Defendant opposed that motion, urging that, absent some demonstration by plaintiff that he had exhausted administrative remedies with respect to claims of handicap discrimination, plaintiff should not be permitted to delay the proceedings. Plaintiff's first motion for leave to amend remains pending.

In his second motion for leave to amend, plaintiff apparently seeks to add one or more constitutional tort claims, alleging deprivation of his right to due process of law under the Fifth Amendment. Plaintiff incorrectly suggests that Title VII claims and Fifth Amendment claims present some sort of identity of issues, such that the relation back doctrine of Fed. R. Civ. P. 15 would treat his constitutional claims as having been timely filed on the date of the original complaint. Whatever merit such an argument might

*Defendant's characterization of the complaint draws substantially upon plaintiff's deposition testimony, as summarized in defendant's motion for summary judgment (Doc. 75). The complaint itself is very general, but is clearly limited on its face to one or more claims of reprisal.

have in a lawsuit against a private or municipal employer, it has none in this case against the Secretary of the Treasury. The only proper party to a Title VII action or handicap discrimination claim against a federal employer is the head of the agency in question. See 42 U.S.C. section 2000e-16(c) (Title VII); 29 U.S.C. section 794a (incorporation Title VII procedures and remedies in Rehabilitation Act claims). With respect to the types of employment discrimination described therein, these statutes constitute the exclusive remedies for employment discrimination in the federal workplace. See Brown v. General Services Administration, 425 U.S. 820, 828 834 (1976). In contrast, constitutional tort claims may not be filed against federal agencies. F.D.I.C. v. Meyer, 510 U.S. 471, 483-86 (1994). Such claims, if available at all, lie against individual federal employees. Since the claims which plaintiff now seeks to add would be against different parties defendant than the claims presently before the court, the doctrine of relation back is unavailing to plaintiff. Where plaintiff has not even purported to identify or serve the putative defendants in his constitutional tort claims, thereby giving them an opportunity to be heard on his motion, he should not be heard to delay these proceedings with an amended complaint. Rather, he should be put to his burden to respond to defendant's motion for summary judgment.

Insofar as plaintiff wishes to demand jury trial for the first time with respect to his original complaint, rather than with respect to the constitutional tort claim that he now seeks leave to file, his motion should be denied in that respect also. Under Rule 38(d), plaintiff's failure to demand jury trial in the complaint or within ten days of the final pleading directed thereto constitutes a waiver of the right to jury trial. The case management report also reflects that this case will involve a nonjury trial. Plaintiff has

failed to show cause why he should now be permitted to retract that waiver and has not addressed the issue in a memorandum of law.

WHEREFORE, defendant respectfully requests that defendant's second motion for leave to amend complaint and to present initial demand for jury trial be denied.

This the 23d day of August, 1999.

Respectfully submitted,

CHARLES R. WILSON
UNITED STATES ATTORNEY

"S/Warren A. Zimmerman"
By: Warren A. Zimmerman
Assistant United States Attorney
Chief, Civil Division, Room 3200
400 North Tampa Street
Tampa, FL 33602
Telephone: (813) 274-6335
Facsimile: (813) 274-6198
Florida Bar No. 652040

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the the original and a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, this 23d day of August, 1999, to the following:

Melvin Blough
803 Tomahawk Trail
Brandon, FL 33511

"S/Warren A. Zimmerman"

WARREN A. ZIMMERMAN
Assistant United States Attorney
Chief, Civil Division

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH,

Plaintiff,

v. :Case No. 98-1358-C.V.-T-24(E)

ROBERT E. RUBIN,
Secretary of the Treasury,

Defendant.

_____/

ORDER

This cause comes before the Court on plaintiff's Motion for Leave to File Memorandum in Support of Motion to Amend Complaint. (Doc. No. 49). Defendant has responded to plaintiff's original Motion to Amend Complaint. (Doc. No. 36).

Upon consideration, it is ORDERED AND ADJUDGED that, plaintiff's Motion for Leave to File Memorandum in Support of Motion to Amend Complaint (Doc. No. 49) is GRANTED IN PART to the extent that plaintiff shall file a supporting memorandum with the Court on or before September 10, 1999.

DONE AND ORDERED at Tampa, Florida, this 30TH day of August, 1999.

"S/Susan C. Bucklew"

SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record
Courtroom Deputy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION FOR LEAVE TO FILE MEMORANDUM OF LAW IN SUPPORT OF SECOND MOTION TO AMEND COMPLAINT UNDER RULE 15(a) FEDERAL RULES CIVIL PROCEDURE

This motion for leave to file in support of a motion pending before the Court is filed under the provisions of Local Rule 3.01(b).

MEMORANDUM OF LAW

This claim of constitutional tort against the United States is not brought under the Federal Tort Claims

Act for personal injury caused by an wrongful act of any employee of the Government while acting within the scope (or outside the scope) of his office or employment.

This Complaint of constitutionally based discrimination is deemed to be the conduct of the sovereign and not the conduct of its agents.

Internal Revenue Service management persons (Prowler, Cox, Breslin, Clark, Rachael, Rodrigueq, etc.) did perform their assigned duties within the abusive management culture of the Internal Revenue Service which not only condoned; but also rewarded the threats, intimidation, harassment and retaliation which Plaintiff was subject to over a eight year period. Liability/responsibility for said abuse rests with the Defendant, not the individuals.

The abusive management culture which did exist within the Internal Revenue Service is best described in the September 10 and 25, 1997 Hearings before the Subcommittee on the Civil Service of the Committee on Government Reform and Oversight House of Representative and nine days of testimony during the 1998 Hearings before the Committee on Finance United States Senate.

As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it. U.S. v. Clarke, 8 Pet. 436, 444.

The doctrine that the United States cannot be sued as a party defendant in any court whatever, except where congress has provided for such suit, examined and reaffirmed, and the nature of this exemption considered. United States v. Lee, 1 S. Ct. 240 (1882).

The constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law, nor private property taken for public use without just compensation, are intended as limitations upon the power of the government in dealing with the citizens, and relate to that class of rights whose protection is peculiarly within the province of the judicial branch of the government. U.S v. Lee, supra.

The evils which it is suggested may arise from interference of state or other courts with the exercise of powers essential to government, are illusory, and are insignificant in comparison with the proposition that no relief can be granted when it is asserted that the United States has authorized the wrong. U.S. v. Lee, supra.

It is not a textual problem, for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes. Keifer & Keifer v. Reconstruction Finance Corp., 59 S. Ct. (1939).

Section 712 of Title VII of the Civil Rights Act of 1964 (USC Title 42, Chapter 21, Subchapter VI, section 2000e-11) provides that Title VII is not the exclusive remedy to Plaintiff who has been recognized by Defendant as a one-hundred percent (100%) disabled veteran. Section 712 of Title VII was not referenced in Brown v. General Service Administration, 96 S. Ct. 1961 (1976) and therefore was not a fact in consideration by the Court.

The United States Government (sovereign) has acknowledged responsibility and liability for the service connected disabilities of Plaintiff/Veteran.

Congress has via a series of statutes expressed its will to waive the Governments sovereign immunity relative to Plaintiff's Complaint of constitutionally based discrimination. In addition to the waiver afforded qualified veterans and non-veterans under Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973; Congress has afforded Plaintiff and other qualified veterans special rights and preferences under Federal Statutes based upon the extent of the disabilities incurred by the respective veteran:

1. Federal Statute on Veterans Preference (Title 5 U.S.C. , section 2108 et. seq.).

2. Employment and Training of Veterans (Title 38 U.S.C., section 4211 et. seq.).

3. Vietnam Era Veterans' Readjustment Act (Title 38 U.S.C. section 4211, et. seq.) which provides a waiver of sovereign immunity by Congress in that section 4214(c) states an express private course of action for disabled veterans alleging discrimination by the Federal Government.

4. Uniform Services Employment and Reemployment Rights Act (Title 38 U.S.C. section 4301 et. seq.) which addresses discrimination of veterans as employees of the Federal Government and provides waiver of sovereign immunity by Congress in that the decision of the Merit System Protection Board maybe appealed to the United States Court of Appeals for the Federal Circuit (Title 38, Chapter 43, section 4324(d)(1)).

The fundamental constitutional right as stated by Plaintiff in Plaintiff's second motion for leave to amend complaint is deemed actionable within this Court.

The constitution clearly creates rights and imposes obligations different from any which exist at common law in the absence of statute. Smith v. Cremins, 308 F. 2d. 187 (9th Cir. 1962).

The central purpose of the Equal Protection Clause of the Fourteenth amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process clause of the Fifth amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 74 S. Ct. 693, (1954).

We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today. Washington v. Davis, 96 S. Ct. 2040 (1976).

The United States of America is also made a party to this Complaint as amended.

The change in defendant's capacity is not substantial enough to prevent the relation back to the date of filing of the original complaint. De Malherbe v. Intern U. of Elevator Constructors, 449 F. Supp. 1335 (1978).

Money damages of ten million dollars ($10,000,000) are sought from the Defendant to redress constitutionally based discrimination directed to Plaintiff.

Plaintiff's request for jury trial under Rule 38(b) of the Federal Rules of Civil Procedure is withdrawn as the request has been modified and presented to the Court as a concurrent motion.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion for leave to file this memorandum in support of Plaintiff's second motion to amend Complaint under Rule 15(a) of the Federal Rules of Civil Procedure.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via facsimile (813) 274-6198 and certified mail to Assistant United States Attorney Warren Zimmerman this seventh day of September, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMPLAINT TO BRING ACTION UNDER THE REHABILITATION ACT OF 1973, AS AMENDED AND THE AMERICANS WITH DISABILITIES ACT OF 1990

This memorandum was authorized by Court Order of August 30, 1999.

The pending amendment to the Complaint of discrimination filed with this Court on June 29, 1998

is not a claim of discrimination against the handicapped Plaintiff which occurred in 1997, but is a claim of prohibited retaliation directed to handicapped Plaintiff in 1997 in response to the prior exercise by Plaintiff of protected activities which occurred in 1993 and 1995.

The purpose in this memorandum is to supplement Doc. No. 33 and Doc. No. 49 which are within the Court record. Exhibits B and F (pages 3 and 4 of the May 25, 1999 deposition) of Doc. No. 89 provide documentation and discussion of the basis for this claim.

This action is requested in addition to and not to the exclusion of Plaintiff's claims of action under Title VII of the Civil Rights Act of 1964 and the claim for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion to amend the Complaint to include action under the Rehabilitation Act of 1973, as amended and those sections of the Americans With Disabilities Act of 1990 which were referenced in the original motion to amend.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Warren Zimmerman this tenth day of September, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, WITH MEMORANDUM OF LAW

Plaintiff moves for denial of Defendant's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure based upon the following considerations:

1. Plaintiff has established a prima facie case of reprisal such as to warrant full trial consideration as to the claim of employment related discrimination under Title VII of the Civil Rights Act of 1964.

2. Defendant has failed to properly state the legal questions presented in this Complaint of discrimination and has also failed to demonstrate that the facts underlying said misguided legal questions are not in dispute. Defendant has therefore failed to properly support his motion for summary judgment.

3. Summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. A motion under Rule 37(b)(2) of the Federal Rules of Civil Procedures is currently before this Court.

4. Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint.

In support hereof, Plaintiff respectfully presents the following:

MEMORANDUM OF LAW IN SUPPORT OF PRIMA FACIE CASE OF REPRISAL

Defendant' arguments is support of summary judgment to Plaintiff's action under Title VII of the Civil Rights Act of 1964:

"Defendant's is entitled to judgment as a matter of law, because plaintiff cannot establish a prima facie

case of reprisal. Plaintiff cannot do so for at least two reasons: First, he cannot point to any *similarly situated employees* who have received better treatment; second; he cannot establish an *'adverse employment action'* or even a composite of employment conditions which, though short of adverse action, meet the test of 'substantiality' so as to constitute actionable reprisal under other circumstances. Even if plaintiff were deemed to have made out a prima facie case, defendant would be entitled to judgment as a matter of law under the *undisputed facts* of record."

1. **Defendant has incorrectly defined "similarly situated employees"relative to the Title VII Complaint before this Court:**

Defendant's argument: "To establish a prima facie case of discrimination under Title VII, 'plaintiff must show that his employer treated similarly situated employees outside his classification more favorably than [him]self.' Holifield v. Reno, 115 F. 3d 1555, 1562 (11th Cir. 1997). To be similarly situated, comparative employees must be similarly situated in all relevant aspects of employment. Id. 'If a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present.' Id.

In order to identify a 'similarly situated' employee plaintiff would have to identify a qualified EO agent who, like plaintiff, was within Florida but not assigned to Prowler's group. In order to establish that such an employee was outside plaintiff's 'class', plaintiff would have to show that the employee had no history of EEO activity of which management was aware. Proof that such an employee was permitted to work CEP cases in

Florida in derogation of the policy of that all such cases be supervised by Prowler would then satisfy the first prong of the required prima facie case."

Plaintiff's objections: Defendant has narrowly defined the phrase "similarly situated employees" such that it does not meet the relevant legal standards and creates an illusionary employee beyond Plaintiff and similarly situated employees.

Under *McDonnell Douglas,* a plaintiff establishes a prima facie case of race discrimination under Title VII by showing ..... (3) his employer treated similarly situated employees outside his classification more favorably. Holifield v. Reno, 115 F.3d 1555 (11th Cir.1997).

To make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all relevant respects. Id.

In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways. Id.

In sum, the elements of a prima facie case vary with the circumstances of the alleged discrimination. Jonesv. Frank, 973 F.2d 673 (8th Cir. 1992).

In the litany of cases which reference or define "similarly situated" employees (*McDonnell Douglas Corp./Smith v. Monsanto Chemical Co./Williams v.Ford Motor Co./Holifield v. Reno, etc.)* the employees conduct was deemed the

defining factor relevant to the determination of "similarly situated" status.

In the case at point, Plaintiff's employment conduct and qualifications are exceptional and without question. Please refer to exhibit A (Doc. No. 89*) which reflects Plaintiff's annual evaluations and performance awards from February 1, 1988 to February 28, 1998. Plaintiff has never been the subject of disciplinary action.

It is Defendant/employer's conduct which is the subject of this Complaint. Please refer to exhibit B (Doc. No. 89) which reflects upon the 1993, 1995 and 1997 EEO Complaints of threats, religious discrimination, harassment and retaliation by Defendant/employer against Plaintiff/employee. Also refer to exhibit C (Doc. No. 89) which provides the depositions of Gary Maxwell (pages 16, 17, 69-73) and Genny Farley (pages 13, 14) attesting to the September 23, 1991 and September 21, 1995 threats of physical injury to Plaintiff by Ron Prowler.

* The exhibits referenced within the Motion were initially presented with Plaintiff's Motion to continue under Rule 56(f) in response to this motion for summary judgment (Document Number 89 per Docket Sheet). It would serve no useful purpose to duplicate the two volumes of exhibits and resubmit at this time. Reference will be made to Doc. No. 89 when appropriate.

It is the legal position of Plaintiff that the standard position description of Plaintiff (as developed by the Office of Personnel Management) provides the relevant employment criteria upon which "similarly situated" employees who wish to conduct examinations of

the largest and most complex entities are properly identified. Please refer to exhibit D (Doc. No. 89) which provides a copy of Plaintiff's Standard Position Description which has remained unchanged since March 27, 1989.

The fact that said similarly situated employees were and continue to be assigned to Ron Prowler's coordinated examination program group is relevant to Plaintiff's claim of disparate treatment via retaliation. Please refer to exhibit E (Doc. No. 89) which provides a listing of EO agents assigned to Ron Prowler's group October 1, 1997 through June 29, 1998. It is these employees with which Plaintiff would have competed absent the threats of physical injury by Ron Prowler. The confirmation that all such employees are outside of Plaintiff's protected group is pending compliance of the Rule 37(b)(2) motion currently before this Court.

The following motions to compel currently before the Court will reflect upon the truth and relevance of this matter:

1. Initial motion to compel production of documents (item 5).

2. Motion to compel third production of documents (item 4).

2. **Defendant's conduct does meet the standard for adverseemployment action:**

Defendant's argument: "Against the backdrop of

this case law, plaintiff's claims clearly fail to allege an employment action that can be characterized as 'adverse'. Plaintiff's mere disagreement with internal revenue service management's decision to assign him one type of GS-13 case versus another type of GS-13 case does not transform that decision into an adverse employment action."

Plaintiff's objections:

Relevant case law – "Titl eVII of the Civil Rights Act of 1964 provides that it is unlawful for an employer 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.' The plaintiff may establish a prima facie case of discrimination under Title VII ..... on the basis of direct evidence of discrimination, which consists of 'evidence which, if believed, would prove the existence of discrimination without inference or presumption'". Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997).

Substantive law will identify which facts are material for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted. Anderson v. Liberty Lobby, Inc., 106S. Ct. 2505 (1986).

"Second, the district court improperly rejected the claim of appellant Bernice Huffman that she was 'demoted' to an inferior job title and duties (although with the same salary) because she was

a female. The court was mistaken in assuming that this claim was not cognizable under Title VII. The former Fifth Circuit held in *Swint v. Pullman Standard,* 539 F.2d 77, 89 (5th Cir. 1976), that 'a Title VII plaintiff does not have to show economic loss to prove discrimination.' Job titles and duties themselves are conditions of employment protected by Title VII. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986).

"Less Desirable Assignments – Prim aFacie Case.

Plaintiffs in successful Title VII cases have uniformly been able to establish that their assignments produced diminished wages. When today's proof was ruled insufficient to demonstrate loss, a novel question was squarely presented. To resolve it requires resort to the statutory language and case analysis of legislative purpose. When this path of reasoning is followed it leads to the conclusion that a Title VII plaintiff does not have to show economic loss to prove discrimination." Swint v. Pullman-Standard, 539 F.2d 77(1976).

"To be actionable under Title VII as 'abusive work environment' harassment, conduct need not seriously affect employee's psychological well -being or lead employee to suffer injury, so long as environment would reasonably be perceived, and is perceived, as hostile or abusive; focusing on employee's psychological well-being or whether employee suffered injury could unnecessarily focus fact finder's attention on concrete psychological harm, which Title VII does not require." Harrisv. Forklift Systems, Inc.,114 S. Ct. 367 (1993).

When employee proves that tangible employment

action resulted from refusal to submit to supervisor's sexual demands, he or she establishes that employment decision itself constitutes change in terms and conditions of employment that is actionable under Title VII; however, ... conduct must be severe or pervasive. Burlington Industries v.Ellerth, 118 S. Ct. 2257 (1998).

Tangible employment action taken by supervisor becomes for Title VII purposes the act of employer. Id.

Employer has no affirmative defense to vicarious liability for supervisor's harassing conduct in violation of Title VII when supervisor's harassment culminates in tangible employment action, such as discharge, demotion, or undesirable reassignment. Id.

A prima facie case of employment discrimination raises an inference of discrimination only because those acts are presumed, if otherwise unexplained, to be more likely than not based on consideration of impermissible factors. Furnco Const. Corp. v. Waters, 98 S. Ct. 2943 (1978).

Once prima facie case of employment discrimination has been made out, burden which shifts to employer is merely that of proving that it based employment decisions on legitimate consideration and not on illegitimate one such as race; to prove that, it need not prove that it pursued course which would both enable it to achieve its own business goal and allow it to consider most employment applications, but need only articulate some legitimate nondiscriminatory reason for applicant's rejection. Id.

To establish causal relation element of prima facie case of retaliation under Title VII, plaintiff need only show that the protected activity and the adverse action are not wholly unrelated. Wideman v. Wal-MartStores, Inc., 141 F.3d 1453 (11th Cir. 1998).

"Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner had discriminated against respondent when he was an employee or followed a discriminatory policy toward Minority employees." McDonnell Douglas Corporation v. Green, 93 S.Ct. 1817 (1973).

In deciding whether employer's violations of Title VII are of a continuous nature for limitations purposes, court must distinguish between present consequences of one-time violation, which does not extend limitations period, and continuation of violation into present, which does. Beavers v. American Cast Iron Pipe Co., 975 F.2d. 792 (11th Cir. 1992).

"Serial Violations. What, then, is meant by the term 'continuing violation'? In one incarnation, the theory recognizes that some acts are imbricated, i.e. they involve an interlinked succession of related events or a fully-integrated course of conduct. Although the limitations clock generally starts with the commission of a discriminatory act, a true 'continuing violation' rewinds the clock for each discriminatory episode along the way. Thus, if the later violations in the series are within the prescriptive period, an employee may pursue them despite the fact that earlier acts, forming part and parcel of the same pattern, have grown stale." Mack v. Great

Atlantic and Pacific Tea Co., Inc.,871 F.2d 179 (1st Cir. 1989).

For purpose of evaluating sufficiency of plaintiff's case against defendant to withstand motion for summary judgment, allegations about conspiracy to boycott plaintiff were to be taken both as true and as legally sufficient. First Nat. Bank of Ariz. V. Cities Service Co., 88 S. Ct. 1575 (1968).

Issue of material fact required by summary judgment rule to be present to entitle party to proceed to trial is not required to be resolved conclusively in favor of party asserting its existence; rather, all that is required is that sufficient evidence supporting claimed factual dispute be shown to require jury or judge to resolve parties' differing versions of truth at trial. Id.

"In 1972 Congress extended the protection of Title VII of the Civil Rights Act of 1964 to employees of the Federal Government. A principal goal of the amending legislation was to eradicate 'entrenched discrimination in the Federal service,' *Morton v. Mancari,* 94 S. Ct. 2474, by strengthening internal safeguards and by according 'aggrieved federal employees or applicants ..... the full rights available in the courts as are granted to individuals in the private sector under title VII." Chandler v. Roudebush, 96 S. Ct. 1949 (1976).

Title 5, Chapter 23, section 2302 United States Code:

Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section –

(A) "personnel action" means –

(xi) any other significant change in duties, responsibilities, or working conditions.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –

(1) discriminate for or against any employee or applicant for employment –

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791);

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of –

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

Employee's transfer to induce his resignation because he was considered undesirable employee was an "adverse action" and entitled employee to a hearing even if it entailed no reduction in rank. Motto v.General Services Administration of U.S., 335 F. Supp. 694 (1971).

Employee may be given fair choice between facing charges or resigning but decision to rid government of employee without complying with statute may not be camouflaged as discretionary decision. Id.

Transfer, like other government action affecting employee's status, may not be based on arbitrary decision to achieve predetermined result. Id.

Government agency is not required to provide life long employment on his own terms to employee who does not do satisfactory job but supervisor may not be permitted to make his own subjective determination that employee is undesirable and achieve that person's separation from service by actions designed to force his resignation. Id.

A. Plaintiff's argument: Against the backdrop of this case law; this complaint addresses eight years of threats, harassment, intimidation, discrimination and retaliation as a pretext for adverse action. Exhibits B and F (Doc. No.89) provide a narrative

of the serial violations of Plaintiff's civil rights over the eight year period.

The Complaint currently before this Court does not reflect upon a "mere disagreement with internal revenue service management's decision to assign Plaintiff one type of GS-13 case versus another type of GS-13 case", but rather an historically abusive and hostile work environment.

"To establish a prima facie case of retaliation, the plaintiff must show: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events." Holifield v. Reno, 115 F.3d. 1555 (11th Cir. 1997).

"Once the plaintiff establishes his prima facie case, the employer must proffer a legitimate, non -discriminatory reason for the adverse employment action. If the employer offers legitimate reasons for the employment action, the plaintiff must demonstrate that the employer's proffered explanation is a pretext for retaliation." Id.

Retaliation factor # 1: Refer to Exhibit B (Doc. No. 89) (EEO Complaints filed by Plaintiff).

Retaliation factor # 2: Refer to documentation Exhibit G (Doc. No. 89). Defendant changed a term or condition of Plaintiff's employment which provided a pretext for adverse action. Plaintiff's position description states that he conducts examinations of the largest and most complex tax -exempt organizations.

Effective with the appointment of Ron Prowler as

CEP manager, Plaintiff was limited to the examination of the lowest priority and smallest tax -exempt organizations. Plaintiff was not only denied the opportunity to conduct examinations of CEP qualified entities, but was also denied the opportunity to examine "Code 8 and Code 9" identified entities. Plaintiff has been subject to an adverse change in a term or condition of Plaintiff's employment.

Retaliation factor # 3: The causal link between the EEO Complaints and adverse employment action is complete with Ron Prowler and the knowledge/actions of decision makers Pat Cox and Peter Breslin. Threats of physical injury to Plaintiff by Ron Prowler were the basis for the 1993 and 1995 EEO Complaints filed by Plaintiff. Plaintiff was required to work for Ron Prowler if he wished to conduct examinations of the largest and most complex tax-exempt organizations effective October 1, 1997. It is for this reason that Plaintiff initiated the Complaint.

Defendant had actual knowledge that Plaintiff had been and was currently engaged in protected activities when Defendant retaliated against Plaintiff.

The decision to take the adverse action against Plaintiff was made by decision makers Pat Cox (Chief, EP/EO Division) and Peter Breslin (Assistant Chief, EP/EO Division). Both individuals were fully aware of Plaintiff's prior and current EEO activity.

Management has chosen to retaliate against Plaintiff at the expense of tax compliance in that there are "more CEP entities in Florida that we can do in the next 100 years" per Division Chief

Pat Cox.

The Internal Revenue Manual provides that CEP qualified entities may be excluded from the CEP examination program for any reason. Division Chief Pat Cox believes the exclusion process to be cumbersome and therefore no requests for exclusion were submitted. See Exhibit G (Doc. No. 89).

Division Chief, Pat Cox is unable to proffer a legitimate, non-discriminatory reason for the adverse employment action.

The following motions to compel currently before the Court will reflect upon this matter:

1. Third motion to compel production of documents (items 2, 4, 6).

2. Fifth motion to compel production of documents (item 7).

It is important for the Court to recognize that although the actual act of retaliation in 1997 was not of itself "ugly" (although intentional), the act was preceded and precipitated by a continuos series of related actions (threats, intimidation and harassment) which were in themselves "ugly" and representative of the abusive management culture which exists within the Internal Revenue Service. Said recognition is fact intensive and therefore worthy of full review upon trial.

The statement of legal issues as presented by Defendant on page five of the motion for summary judgment is a misrepresentation to the Court given the following facts which were confirmed during the discovery process:

1. Ron Prowler did threaten Plaintiff with physical harm on multiple occasions over an eight year period.

2. Internal Revenue Service management was advised of the threats directly by Plaintiff and via third-parties (i.e. IRS Inspections, National Union local President, Group Manager Genny Farley).

3. Internal Revenue Service management did promote and protect Ron Prowler and did concurrently harass, intimidate and retaliate against Plaintiff such as to constitute a continuous violation over an eight (8) year period.

The "ultimate question" in a disparate treatment case is not whether the plaintiff established a prima facie case or demonstrated pretext, but whether the defendant intentionally discriminated against the Plaintiff. United States Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478 (1983).

DEFENDANT HAS FAILED TO PROPERLY SUPPORT THE MOTION FOR SUMMAY JUDGMENT

The party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Adickes v. S.H.Kress & Co. 90 S. Ct. 1598 (1970).

The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding

that the non-moving party has introduced no evidence whatsoever. City of Delray Beach, Fla. v. Agricultural Ins. 85 F.3d. 1527 (11th Cir. 1996).

The CASE MANAGEMENT AND SCHEDULING ORDER as presented by the Court December 29, 1998 did provide that "unless the parties are in full agreement as to the undisputed facts, the movant shall file a separate Statement of Undisputed Facts, with citations to the record, which shall accompany the motion for summary judgment". No such Statement was provided by Defendant.

The following factual representations by Defendant are disputed by Plaintiff:

1) Page 1 of Defendant's Motion For Summary Judgment.

   Factual inference by Defendant:
   Misstatement by Defendant as to form of retaliation by Defendant against Plaintiff.

   "Specifically, plaintiff asserts he was retaliated against by management's alleged refusal to permit him to audit tax exempt organizations meeting the criteria for examination under the so-called coordinated examination program ("CEP") of the Internal Revenue Service.

   Plaintiff's objection: The retaliation by Defendant was initiated in two forms:

   A) Plaintiff was required to work for Ron Prowler to conduct examinations of the largest and most complicated

examinations in accordance with his Standard Position Description. Said examinations were identified within the coordinated examination program universe.

B) Plaintiff was restricted to the examination of the smallest and least complicate examinations within his grade classification. Plaintiff was not permitted to conduct examinations of Code 8 (gross receipts $10,000,000 to $50,000,000) or Code 9 (gross receipts in excess $50,000,000) tax returns; and was in fact limited to the examination of tax returns with less than $5,000,000 in gross receipts. Division Chief Pat Cox did state during his deposition that "I am not sure that $5 million even qualifies as grade 13 case (work), quite candidly". (Doc. No. 89 exhibit G page 60).

2) Page 2 of Defendant's Motion For Summary Judgment.

Factual inference by Defendant: On September 23, 1991, Prowler confronted plaintiff face-to-face and addressed him in a belligerent manner. ..... Plaintiff refrained from formally complaining about Prowler's behavior for more than two years.

Plaintiff's objection: Prowler did threaten Plaintiff with physical injury on September 23, 1991 as confirmed in the sworn deposition of Gary Maxwell (Doc. No. 89 exhibit C page 16).

The Chief, EP/EO Division and President employees Union were immediately notified of the threat against Plaintiff (Doc. No. 89 exhibit B memorandum dated September 23, 1991).

3) Page 4 of Defendant's Motion For Summary Judgment.

Factual inference by Defendant: There is no evidence that Prowler thought he could get away with injuring plaintiff or otherwise intended to harm plaintiff physically.

Plaintiff's objection: Cannot prove a thought existed and failure to act does not prove that intent did not exist.

4) Page 4 of Defendant's Motion For Summary Judgment.

Factual inference by Defendant: Plaintiff did make an administrative claim of employment discrimination under the Rehabilitation Act as a result of this alleged threat.

Plaintiff's objection: Administrative claim did include the Rehabilitation Act and Title VII of the Civil Rights Act of 1964, as amended.

5) Page 4 of Defendant's Motion For Summary Judgment:

Factual inference by Defendant: Cox acted without discriminatory or retaliatory intent in taking the foregoing actions.

Plaintiff's objection: The administrative acts referenced do not relate to; however are being presented is an effort to justify retaliatory conduct on behalf of Defendant.

Affidavit of Pat Cox submitted as exhibit A (paragraph 9) attached to Defendant's Motion For Summary Judgment. "At all times I have honored Mr. Blough's request not to be supervised by Ron Prowler".

It is well documented that Cox was aware that Plaintiff wished to work coordinated examination program cases in accordance with his Standard Position Description (Doc. No. 89 exhibit G); however required Plaintiff to work for Prowler if he wished to conduct examinations of coordinated examination program qualified entities. Plaintiff did present a viable alternative; however Cox now deems the process to be administratively "cumbersome" without further comment as to difficulty involved in a process which was never attempted throughout the EP/EO Division Southeast Region.

It has been established that Pat Cox as Division Chief and other management persons under his control did restrict Plaintiff's work assignment's to the smallest and least challenging subsequent to the appointment of Ron Prowler as manager of coordinated examination program cases in Florida. It has been acknowledged by Defendant that during the nine year period preceding the appointment of Ron Prowler to said management position; Plaintiff did devote substantially all his time to the conduct of coordinated examination program qualified

entities (annual gross receipts $400 million to $1 billion). Plaintiff's performance during this period was rated as excellent (Doc. No. 89 exhibit A). It is difficult to imagine a more blatant example of retaliation.

6) Page 5 of Defendant's Motion For Summary Judgment.

Factural inference by Defendant: Not being a member of Prowler's Group 7214, plaintiff does not work CEP cases in Florida, which are exclusively supervised by Prowler.

Plaintiff's objection: Statement is not true. On March 8, 1999 (fourteen months after filing EEO Complaint and eight months after initiating action for discrimination in this Court) Plaintiff was assigned the examination of a coordinated examination program entity under the regular examination program. It will be proven upon trial that the size and complexity of the initial review of the case file would reflect CEP qualified status to even the least informed.

7. Page 10 of Defendant's Motion For Summary Judgment.

"Question by Defendant: Do you know whether those people who do perform CEP exams under Mr. Prowler's supervision since 10/1/97 have a history of filing EEO complaints or not?

Response by Plaintiff: I don't know.

Factual inference by Defendant: In light of plaintiff's own testimony nullifying the

existence of any similarly situated employee outside his class who received disparate treatment, summary judgment should be granted to defendant."

Plaintiff's objection: The response by Plaintiff indicates that he is not aware of such filings. It is improper for Defendant to factually misrepresent the response. The following motion to compel currently before the Court will reflect upon the truth and relevance of this matter:

1. Initial motion to compel production of documents (item 10).

8. Page 11 of Defendant's Motion For Summary Judgment.

"At other points in his testimony, plaintiff recognized that Prowler's supervisory status alone could not give rise to a cause of action by plaintiff. For example, in responding to a question about the nature of his mental anguish, plaintiff volunteered:

I'm not here to tell them who to make managers. That's certainly not my job. But you have to consider my rights too when you do so. You have no right to tell me to work for someone that's determined to hurt me".

Factual inference by Defendant: There is no cause for action if we ignore the fact that plaintiff would be required to work for a man who had made multiple threats of physical violence against plaintiff.

Plaintiff's objection: The fact is that Plaintiff was required to work for Ron Prowler if he wished to conduct examinations of the largest and most complex entities in accordance with his position description.

9. Page 14 of Defendant's Motion For Summary Judgment.

"Plaintiff recognizes that the procedure for excluding CEP cases and handling them through the regular program is a cumbersome one".

Plaintiff's objection: Neither the transcript of Plaintiff's deposition nor any other documentation reflects such an admission by Plaintiff. Plaintiff does not acknowledge that the process for exclusion is cumbersome or that the conduct of said examinations under the regular examination program is cumbersome. Plaintiff certainly does not accept the premise that even if a procedure is cumbersome; that is a legitimate, nondiscriminatory reason to violate an employees civil rights.

10. Page 14 of Defendant's Motion For SummaryJudgment.

"plaintiff has conceded a lack of evidence that management's decision was anything other than a good faith management decision"

Plaintiff's objection: No such concession has been made in Plaintiff's deposition nor in any other form. Plaintiff's response in the deposition was that the decision was poor tax

administration and the record demonstrates that the decision in question was retaliatory in nature.

11. Page 14 of Defendant's Motion For Summary Judgment.

"Accordingly, even assuming that plaintiff could establish a prima facie case of reprisal, his lack of any evidence whatsoever to suggest that management's proffered explanation of its actions is pretextual and that the real reason for the challenged actions dooms his claim."

Plaintiff's objection: The following motions to compel currently before the Court will reflect upon the truth of this matter:

1. Initial motion to compel production of documents (items 5).

2. Motion to compel third production of documents (items 2, 4, 6).

3. Motion to compel fifth production of documents (item 7).

12. Declaration of Deane Cox, Chief, EP/EO Division Southeast Key District, Internal Revenue Service (exhibit A) Defendant's MotionFor Summary Judgment:

The following statements are deemed to be misrepresentations by Mr. Cox and will be most properly addressed during the course of trial:

9. "I am aware that Mr. Blough's unwillingness to be a member of any group supervised by Mr. Prowler or otherwise to work under Mr. Prowler's supervision substantially limits Mr. Blough's ability to work CEP cases in Florida, since these are exclusively supervised by Mr. Prowler. However, in my opinion, this limitation cannot be deemed a hostile work environment for several reasons. First, it is a limitation of Mr. Blough's choosing. Second, Mr. Blough remains eligible to participate as a team member handling one or more CEP cases outside the State of Florida. Mr. Blough was recently offered the opportunity to participate in two CEP cases, one in Richmond, Virginia and one in Washington, D.C.; but he declined to do so.

10. I am also aware of Mr. Blough's position that various CEP or so-called 'CEP-qualified' cases should be specifically excepted from the program, such that he may work the cases in his current group. The procedure for excepting cases from the program is cumbersome and requires the ultimate approval of the national office. ..... Such declinations have never been made on account of Mr. Blough's history of EEO activity.

13. In summary, I have never treated Mr. Blough differently from other agents or subjected him to different terms, conditions or benefits of employment on account of his history of EEO activity or his disabilities.

DISCOVERY PROCESS INCOMPLETE AS TO ESSENTIAL INFORMATION:

Plaintiff's Request For Continuance Under Rule 56 Fed. R. Civ. P. in response to this Motion for Summary Judgment did specify twenty-five (25) requests which Plaintiff identified as essential to his opposition. Six (6) of the requests which were ordered to be produced under Order of this Court are the subject of a Rule 37(b)(2) motion currently before this Court. These requests are the most essential to Plaintiff's opposition to this Motion for Summary Judgment as illustrated in each of the requests presented within the Rule 37(b)(2) motion.

Failure by Defendant to fully comply with the discovery Order of this Court dated August 6, 1999 has rendered unnecessary Plaintiff's request for permission to file a thirty (30) page legal memorandum in response to Defendant's motion for summary judgment.

Rule 56(e) provides that, when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc. 106 S. Ct. 2505 (1986).

"This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. Id.

ADDITIONAL CAUSES OF ACTION PENDING BEFORE THE COURT:

Two motions are currently pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964.

The following comments were volunteered by Plaintiff during the deposition by Defendant of May 25, 1999 (page 58):

> "You know, I'd like to say I'm using the 1973 Rehab Act. I'm using Title 7 of the 1964 Civil Rights Act. I'm going to go under hopefully 42 -- Title 42, section 1985. These are just the means by which I'm trying to address what I think is a real injustice within the IRS. The way they've treated me. The way they've treated Mr. Prowler.
>
> It's all one big collection, and it's just one -- it's called discrimination from 1991 up through the present. I know we can try to isolate events and say this was discriminatory. It's all one collective event. And I think we have to look at the entire picture to understand. I'm really disappointed in the United States government. Not only for -- it wasn't their fault in Vietnam so much as it happened. Okay. And I accepted that. But I'm not accepting what they're doing to me here. And these maybe -- you know, I'm just using these as vehicles to address that."

Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. The facts are consistent with each route; however the law and remedies differ.

1. Deprivation of a fundamental and protected liberty interest which exists within the Fifth

Amendment to the United States Constitution.

2. Unlawful intentional discrimination which is prohibited under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

3. Unlawful intentional discrimination which is prohibited under the Rehabilitation Act of 1973, as amended.

WHEREFORE, Plaintiff respectfully requests that the Court deny Defendant's motion for summary judgment in that a genuine issue of discrimination exists before the Court.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Warren Zimmerman this tenth day of September, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

99-13735-FF

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

BRIEF FOR APPELLANT

MELVIN E. BLOUGH
Pro Se - Appellant
803 Tomahawk Trail
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BLOUGH v. LAWRENCE SUMMERS, Secretary of the Treasury

(11th Cir. - No. 99-13735-FF)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Roberta Bahnsen, Assistant United States Attorney, district court co-counsel for Secretary;

2. Melvin E. Blough, plaintiff-appellant, pro se;

3. Donna A. Bucella, United States Attorney;

4. The Honorable Susan C. Bucklew, United States District Judge;

5. Secretary of the Treasury, defendant-appellee;

6. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

7. Yvette Rhodes, Assistant United States Attorney, Appellate Division;

8. Susan Roark Waldron, Assistant United States Attorney, appellate counsel for Secretary.

9. The Honorable Charles R. Wilson, United States Circuit Judge, former United States Attorney (interested solely in his capacity as former United States Attorney); and

10. Warren A. Zimmermam, Assistant United States

Attorney, Chief, Civil Division, district court co
-counsel for Secretary.

STATEMENT REGARDING ORAL ARGUMENT

As the resolution of the issues in this case requires this Court to make an independent examination of the record in order to determine whether , oral argument by Appellant is not essential.

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STATEMENT OF JURISDICTION

This action represents an appeal of a final decision by the district court in the granting of summary judgment under Title 28 section 1291 and an appeal from an order denying a preliminary injunction under Title 28 section 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. In WASHINGTON v. GLUCKSBERG, 117 S. Ct. 2258 (1997) , the Court held that "our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' *id.*, at 503, 97 S. Ct., 1938 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937). Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. *Flores, supra,* at 302, 113 S. Ct., at 1447; *Collins, supra,* at 125, 112 S. Ct., at 1068; *Cruzan, supra,* at 277-278, 110 S. Ct., at 2850-2851. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' *Collins, supra,* at 125, 112 S. Ct.,

at 1068, that direct and restrain our exposition of the Due Process Clause."

The following question of law is presented to the Court:

Do totally and permanently disabled veterans have a fundamental and Constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by an Executive Agency of the United States Government ?

2. Whether the district court erroneously denied the Motion for Summary Judgment.

3. Whether the district court improperly dismissed my motion to amend the Complaint to include a claim of Constitutional deprivation of a fundamental and protected Fifth Amendment liberty interest by the United States Government.

4. Whether the district court abused its discretion in the granting of the request for summary judgment.

STATEMENT OF THE CASE AND FACTS

(i) Course of proceedings and disposition in the court below:

The district court did deny my request for a preliminary injunction and did grant the motion for summary judgment by Agency.

I did appeal both decisions and the appeals have been consolidated before this Court.

(ii) Statement of the facts:

This Complaint encompasses a claim of Constitutional tort against the United States Government (Doc 97 and 104) and claims of civil rights violations directed to the United States Treasury (Internal Revenue Service hereafter referred to as "Agency") under Title VII of the Civil Rights Act of 1964 (Doc 1) and the Rehabilitation Act of 1973 (doc 33, 49, 106).

The genesis of the Complaint occurred in 1991 and as described in the court record; did precipitate a chain reaction of threatening and retaliatory actions against me by Agency management persons which continue to the present.

The factual circumstances pursuant to which Agency management persons Mike Rachael, Ron Prowler and Melanie Clark initially developed an animus against me are presented at my deposition of May 18, 1999 (Doc 89 pg 10 line 4 thru pg 45 line 22). The animus was initially directed to the taxpayer under examination by the Agency ; however was also directed to me for objecting to said conduct.

The subsequent threats of physical injury to me by Agency Group Manager Ron Prowler are discussed in the depositions of Gary Maxwell and Genny Farley taken on June 4, 1999 (Doc 89 pg 16 line 7 thru pg 17 line 21 and pg 11 line 12 thru pg 15 line 3 respectively) and my deposition taken on May 18, 1999(Doc 89 pg 46 line 4 thru pg 48 line 13).

Ron Prowler did cease to be the Group Manager of those employees in my post-of-duty effective October 1, 1991 and I have had essentially no contact with him since said date. Ron Prowler's replacement as Group Manager during 1992 and 1993 (Melanie Clark) had a historical and favorable working relationship with Ron Prowler and was one of the individuals referenced above who developed an animus against me. Melanie Clark did harass me during her tenure as Group Manager and did restrict the assignment of examinations to me to encompass only small entities as discussed in my deposition of May 18, 1999 (Doc 89 pg 61 line 4 through pg 62 line 14 and Doc 25 pg 16).

In 1993 I did file a formal Complaint with the Agency which complained of employment related discrimination by the specific management persons against the specified taxpayer and retaliation by said persons against me for objecting to said animosity (Doc 89) . The 1993 Complaint also referenced the September 23, 1991 threat of physical injury to me by Agency Group Manager Ron Prowler. I withdrew the 1993 Complaint based upon the erroneous belief that the threats and retaliation would stop (Doc 89).

In 1995 I did file a Complaint with the Agency and the Equal Employment Opportunity Commission (EEOC) based upon the September 21, 1995 threat of physical injury to me by Agency Group Manager Ron Prowler (Doc 89). The threat in 1995 was precipitated by my reporting of the September 23, 1991 threat to the new Division Chief (Pat Cox) and Assistant Division Chief (Peter Breslin) as reflected in the June 4, 1999 deposition of

Genny Farley (Doc 89 pg 11 line 12 thru pg 15 line 3).

The 1995 Complaint was not accepted for investigation by the Department of the Treasury Regional Complaint Center on the basis that the threats provide "no conceivable impact on your employment" and the threats "were not followed by a personal loss or direct harm to you" (Doc 89). I immediately appealed the dismissal to the EEOC on the basis that a threat of violence against a disabled person is sufficient to justify a claim of discrimination and it is not necessary for the violent act to have actually occurred for relief to be granted. The EEOC denied my appeal based the conclusion that actual present harm (as opposed to possible future harm) must exist (Doc 89).

In August 1995 the Agency did initiate a Coordinated Examination Program (CEP) examination in central Florida and I did function as the team coordinator under the direction of Case Manager Genny Farley for the remainder of 1995 as discussed in the deposition of Genny Farley (Doc 89 pg 10 lines 3 through line 16). Responsibility of Case Manager was transferred to Group Manager Lee Cogburn effective January 1, 1996 and I remained team coordinator of said CEP examination until the conclusion of the examination in September 1997 as discussed in my deposition of May 15, 1999 (Doc 89 pg 83 lines 6 through 11).

Effective October 1, 1997 I was assigned to Group Manager Terri Rodriguez. Ms. Rodriguez had a historical and favorable working

relationship with Ron Prowler prior to becoming an Agency Group Manager. Ms. Rodriguez has harassed me during her tenure as Group Manager and has restricted the assignment of examinations to me to encompass only small entities (Doc 25 pg 16 and doc 12 and doc 15).

In 1997 I did file a Complaint of discrimination with the Agency based upon a claim of retaliation for filing the 1995 Complaint (Doc 89). The basis in the 1997 Complaint is that the Agency (Division Chief Pat Cox and Assistant Division Chief Peter Breslin) did change a term or condition of my employment in requiring me to work for Agency Group Manager Ron Prowler if I wished to conduct examinations of the largest and most complex entities as presented in the June 28, 1999 deposition of Pat Cox (Doc 89 exhibits 1 and 3). My Standard Position Description is presented in the deposition of Gary Maxwell (Doc 89 exhibits 2, 3, 4 Article 26 section 3 A of the Agency/Union Contract) and provides that I am required to conduct examinations of the largest and most complex entities. The Agency has admitted that I did in fact conduct said examinations for substantially the entire period beginning October 1, 1988 and ending September 30, 1997 (Doc 66). The Agency has also admitted that in refusing to work for Agency Group Manager Ron Prowler due to the threats against me, the examinations assigned to me have been below my grade level (Doc 89 pg 60 lines 18 and 19 of the June 28, 1999 deposition of Pat Cox).

Division Chief Pat Cox did state that it is part of his job responsibilities as Division Chief to be made aware of what EEO complaints are

filed and, if possible, to actively seek resolution (Doc 89 pg 10 line 18 through pg 11 line 3 of the June 28, 1999 deposition of Pat Cox).

The Agency handbook of employee conduct and ethical behavior (which provides guidance to penalty determinations) states that threatening another employee with physical harm subjects the employee to reprimand or removal (Doc 89). During the deposition of Division Chief Pat Cox on June 28, 1999 I did reference the threats by Ron Prowler and the required penalties. Pat Cox acknowledged that he took no actions in regard to the allegation (Doc 89 pg 22 line 18 through pg 24 line 20).

The largest and most complex examinations are designated as Coordinated Examination Program (CEP) qualified cases. Section 7(10)(18)4.2(2) of the Internal Revenue Manual provides that a District may exclude a CEP case from the program for any reason (Doc 89).

Division Chief Pat Cox did state that there are more CEP identified examinations in Florida than the Agency can do in the next 100 years (Doc 89 pg 43 line 12 through pg 44 line 11 of the June 28, 1999 deposition of Pat Cox).

Division Chief Pat Cox did state that cases were not excluded from the CEP universe of qualified cases because "I think that those cases should be worked using CEP procedures" (Doc 89 pg 46 line 8 throug hpg 48 line 9). I did respond that based upon my personal audit experience; said cases could be done just as well under the regular examination (as opposed to CEP) program. No further response was provided by Pat Cox (Doc 89 pg

49 lines 6 through 16 of the June 28, 1999 deposition of Pat Cox).

During the deposition of Division Chief Pat Cox it was stated that no CEP examinations were conducted in Northern, Central or Southwestern Florida during 1995, 1996, 1997 or 1998 (with the exception of the CEP examination which I did conduct from August 1995 through September 1997). It was also stated that 61 percent of the CEP identified entities located in Florida are located in said geographic area. Pat Cox did state that "we just don't have the resources (to do them), quite honestly" (Doc 89 pg 53 line 16 through pg 55 line 1).

When I inquired as to who made the decision to eliminate me from the CEP qualified examinations; my Branch Chief Mike Rachael responded "well it was kind of a decision by a number of us" (Doc 89 pg 50 lines 1 through pg 52 line 2 of my deposition of May 25, 1999). Mike Rachael was one of the individuals referenced above who displayed an animus against me dating back to 1991.

There exists a category of large examinations that are not identified or qualified for the CEP program (i.e. "Code 8 and Code 9 cases" with gross receipts and/or assets over $10 million). When I mentioned to Division Chief Pat Cox that the cases assigned to me approximated $5 million, he stated "I am not sure $5 million even qualifies as a grade 13 case, quite candidly". I have been a GS-13 since 1989. (Doc 89 pg 58 line 20 through pg 60 line 19).

The court was aware of my status as a totally

and permanently disabled veteran, third-party confirmation as to threats of physical harm to me, testimony before the United States Senate Finance Committee relative to the abusive management "culture" within the Agency, and my mental/physical condition prior to the court's decision on my request for a preliminary injunction (Doc 25).

I did present a claim of Constitutional deprivation of a protected liberty interest in response to the question of irreparable injury at the preliminary injunction hearing. The claim of Constitutional deprivation also addressed the merits of the Complaint and the public interest factor (Doc 25 pgs 1 thru 20 and Doc 32). I was unable to predict the manner in which the continued violation of my Constitutional right to liberty would be infringed upon by the Agency (Doc 32).

A United States Magistrate did on May 25, 1999 state that the Agency will be required to comply with his findings relative to my discovery requests (Doc 60 pg 44 lines 17 thru 19). By Order dated August 6, 1999 the United States Magistrate did compel discovery of materials which I deemed essential to my response to the motion for summary judgment by the Agency (Doc 96 and 107). The Agency failed to obey the court's discovery Order of August 6, 1999 (Doc 101) and said failure did continue on date the court granted Agency motion for summary judgment (Doc 103).

My response to the motion for summary judgment by Agency (Doc 107) did state that summary judgment should be denied in that I had not had the opportunity to discover

information essential to my opposition to the motion for summary judgment and a motion to amend the Complaint to include a claim for deprivation of a Constitutional right was pending before the court. The Order of the court granting summary judgment to Agency is silent as to the outstanding discovery Order (Doc 96) and the motion to amend the Complaint to include a claim of Constitutional deprivation of a fundamental and protected liberty interest (Doc 97 and 104).

The motion for summary judgment by Agency (Doc 75) did not question the relevancy of the span of time between my 1995 Complaint and the adverse employment action in 1997.

The Complaint before the court addresses eight years of threats, harassment, intimidation and retaliation as a pretext for adverse action of a continuous nature (Doc 107 pgs 8 thru 11).

At no point in the court record did I allege that the "reorganization" and creation of Group 7214 was done to retaliate against me nor does the court record indicate that the decision to create Group 7214 was in response to a national IRS office decision. The Order of the court granting Agency motion for summary judgment (Doc 111) addresses only those questions relating to the assignment of CEP examinations and fails to comment on the very extensive number of Code 8 and Code 9 examinations which I was also discriminatingly excluded from the examination of (doc 107 pg 15) and which remain outstanding contrary to the discovery

Order of the court dated August 6, 1999 (Doc 101).

The Order of the district court granting Agency motion for summary judgment (Doc 111) did render moot all pending motions; including the motion to amend the Complaint to include a claim of Constitutional tort against the United States Government (Doc 97 and 104).

(iii) Standard of review:

The standard of review relative to the Order denying the request for a preliminary injunction is that of a clearly erroneous finding by the district court.

The standard of review relative to the Order granting the motion for summary judgment and denying as moot all other pending motions is a de novo process with the reviewing court applying the same legal standards as the district court. Hammer v. Slater, etal., 20 F.3d.1137(11th Cir. 1994).

ARGUMENTS

1. "Analytically the bill of rights are bills of liberties. They guarantee that the agents and agencies of politically organized society will not do certain things and will not do certain other things otherwise than is certain ways". *Dean Roscoe Pound - The Development of Constitutional Guarantees of Liberty".*

AMENDMENT V to the Constitution of the United States provides a number of guarantees, one of

which is that no person shall be deprived of liberty without due process of law

Discrimination may be so unjustifiable as to be violative of due process. Detroit Bank v. United States, 63 S. Ct. 297; Bolling v. Sharpe 74 S. Ct. 693(1954); Schneider v. Rusk 84 S. Ct. 1187 (1964).

The right is fundamental because it is preservative of all rights. YickWo v. Hopkins, 6 S. Ct. 1064.

The principles laid down in this opinion affect the very essence of Constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, ---- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Boyd v. United States, 6 S.Ct.524.
Congressional Record - Hous eof Representatives
April 17, 1944:

VETERANS PREFERENCE IN THE FEDERAL CIVIL SERVICE

Mr. Starnes of Alabama. Mr. Speaker, from the very inception of our Republic our Government has extended certain special benefits and

privileges to the men who have offered their lives in the defense of the country and its institutions. This is a sound principal. Those who are selected from among us to wear the uniform and to serve the country on the firing line are certainly entitled, when peace has been won through their efforts, to be selected and given special consideration and preference in employment by the Government in peacetimes. That is a reward to an American who has willingly and gladly offered his life in an effort to save and to sanctify for us the principles of government under which we live, and which by their sterling efforts is being handed on to posterity.

The first comprehensive federal veterans' statute was enacted in Veterans' Preference Act of 1944, 58 Stat 387. The Federal Government has, however engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. See, e.g. Res. of Mar. 3, 1865, No. 27, 13 Stat. 571. Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979).

The Federal Government, in its capacity as an employer, determined to take the lead in such a program. The Veterans' Preference Act was accordingly adopted, creating special preference and protection for returning veterans at every stage of federal employment. Mitchell v.Cohen, 68 S. Ct. 518 (1948).

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

VETERANS PREFERENCE

Sec. 712. Nothing contained in this title shall be

construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

U.S.C. TITLE 5 sections 2108 and 3502 provide special considerations to disabled veterans upon entering and retaining employment with the Federal Government.

U.S.C. TITLE 38 provides an extensive array of benefits available to disabled veterans including healthcare, education, housing assistance, clothing allowance, car allowance, compensation for service connected injuries, insurance, etc.

Doc. 25 provides exerts from the IRS OVERSIGHT HEARINGS before the Committee on Finance United States Senate. A thorough review of the comments during the January 28, 29; February 5, 11, and 25, 1998 hearings and the April 28, 29, 30, and May 1, 1998 hearings reflects upon a very abusive management "culture" within the Agency.

I have endured eight years of managerial abuse within the Agency and I know that it is not the Ron Prowler's or the Pat Cox's that are to blame, but rather the Agency itself.

The first time I really felt handicapped after Vietnam was on September 23, 1991 when Ron Prowler put his fist in my face and backed me against those file cabinets. He took something special away from me that day.

2. The district court denied the request for preliminary injunction based upon a finding that I had failed to prove irreparable injury and

substantial likelihood of prevailing on the merits (Doc. 32 pg 16).

The United States Supreme Court has ruled that loss of Constitutional rights constitutes irreparable injury. Elrod v. Burns 96 S. Ct. 2673 (1976). I believe the district court failed to properly consider the facts presented and the law in that this is truly the genuinely extraordinary situation required by the United States Supreme Court in Sampson v. Murray, 94 S. Ct. 937 (1974).

3. The district court ruled improperly (Doc. 111) that my motion (Doc. 97 and 104) to amend the Complaint as moot. As in the case of Sherman v. Hallbauer, 455 F.2d 1236 (5th Cir. 1972) ; in the interst of justice the court should have allowed the amendment. This decision within the Fifth Circuit is binding on the Eleventh Circuit Bonner v City of Prichard, Ala, 661 F.2d. 1206 (11th Cir. 1981).

4. The district court clearly abused its discretion in that it went beyond the pleadings of both parties (Doc. 75 and 107) and drew inferences which were erroneous and unsupported by either the facts or the law. In my response (Doc 107) to the motion for summary judgment (Doc. 75) I did throughout the response state that I had not had the opportunity to discover information that is essential to my opposition to the motion for summary judgment and referenced Anderson v. Liberty Lobby, Inc.106 S. Ct. 2505 (1986). The district court judge ignored the outstanding court Order issued by the magistrate.

I also referenced the pending motion to amend the Complaint.

The district court incorrectly assumed that because I filed my EEO Complaint in 1995 and there were no reported adverse actions taken until 1997 that there was no causal relation between the two events. As the pleadings to the motion for summary judgment indicate, neither party entertained this erroneous assumption. During the period beginning August, 1995 and September, 1997 I did function as case coordinator on a CEP examination under the direction of a Group Manager who has not animus towards me in that we did work together as employees in 1983. It was not until I completed the CEP examination in September, 1997 that Agency management persons had an opportunity to retaliate against me. The district court is incorrect in assuming that a statue of limitations does exist relative to acts of retaliation. This matter could have been clarified at a summary judgment hearing.

The district court also incorrectly accepted the non-discriminatory explanation by Division Chief Pat Cox that the process for excluding cases from the CEP program was cumbersome. During the deposition of Pat Cox he stated that it was necessary that said cases be completed under CEP exam procedures; however when I pointed out that said examinations could be completed equally well under the regular examination program he did not comment. For purposes of summary judgment he has chosen to rely upon the vague term "cumbersome" Filing one's income taxes is cumbersome but we all do it because it is the law. It is not acceptable to discriminate against an individual because it would be cumbersome not to do so.

CONCLUSION

For the reasons stated above, it is requested that the motion for preliminary injunction be granted, the motion for summary judgment be denied, and the case remanded to the district court with proper instruction.

Respectfully submitted via certified mail this eight day of November, 1999.

"S/ Melvin E. Blough" pro se

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan Roark Waldron this eight day of November, 1999.

"S/ Melvin E. Blough" pro se

99-2435-FF
99-13735-FF

CONSOLIDATED APPEAL

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

SECRETARY, DEPARTMENT OF THE TREASURY,

Defendant-Appellee.

CONSOLIDATED APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

REPLY BRIEF FOR APPELLANT

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ARGUMENTS AND CITATIONS OF AUTHORITY

This Complaint is not about work assignments as the Secretary has suggested to the Court. *

The following exchange between myself and counsel for the Secretary touches upon the basis for this Complaint (R2-89 deposition May 25, 1999 pg 52 lines 9 thru 20):

Question by Secretary: So, in your view much or all of your mental anguish and your need for Paxil would disappear if you were simply allowed to work CEP-qualified cases under the supervision of somebody besides Ron Prowler ?

My answer: No. What's happened is we -- they pushed me so hard I can't accept anymore -- and I talked it over with the VA psychiatrist. This country you had a very negative affect on my life in Vietnam. Now I go to work for the IRS, and you're doing it again. And you don't have that right. There's no reason for that man to threaten me. There's no reason for them to retaliate against me. And I won't tolerate that.

I have appealed to this Court to address four issues relative to my Constitutional and civil rights. I will reply to the Brief of Appellee in the same sequence as the issues were presented in my initial Brief.

ISSUE NUMBER ONE OF APPELLANT'S BRIEF

Do totally and permanently disabled veterans have a fundamental and Constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by an Executive Agency of the United States Government ?

Appellee's brief fails to provide comment relative to this issue.

*Appellant adopts the designation of Appellee as "Secretary" for purpose of continuity with Brief of Appellee.

I will supplement my original brief as follows:

In preparation for this reply I read the proceedings and debates of the 88th Congress relative to the Civil Rights Act of 1964 as they appear within the Congressional Record. H.R. 7152 was introduced in the House June 20, 1963 and passed by the Senate June 19, 1964. The civil rights bill was a very interesting part of America's history and involved hundreds of hours of debate. Title VII was a very controversial portion of the Act.

My reason for said research was to determine the thought process by which, and the basis for which, Congress developed and included section 712 of Title VII. Section 712 provides that "nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans". There was no debate on section 712 -- it may have been the only section upon which all were in agreement.

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII of the Civil Rights Act of 1964 may restrict a veterans Constitutional rights and the Courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

The equal employment provisions of the Civil Rights Act were designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. Alexander v. Gardner-Denver Company, 94 S. Ct. 1011 (1974).

The due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States government from invidious discrimination. Washington v. Davis, 96 S. Ct. 2040 (1976).

The reliance by Secretary on *Brown v. General Service Administration, 96 S. Ct. 1961 (1976)* is misplaced based upon the express provision of Congress under Section 712 of Title VII of the Civil Rights Act of 1964 and the finding by the United States Supreme Court that discrimination by the United States government may be so unfair as to violate Fifth Amendment rights.

The Federal rights question presented as issue number one is believed to meet the United States Supreme Court's substantive-due-process analysis as presented in Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

The foundation for this Complaint originated twenty-eight years ago when I sat in a wheelchair at a United States Army hospital as a result of injuries received in Vietnam. Based upon personal experience, I came to believe that there are no persons in America more deserving of the Constitutional protections of the Fifth Amendment than the totally disabled veterans who fought and endured pain and sacrifice to defend the principals within said Constitution.

ISSUE NUMBER TWO OF APPELLANT' BRIEF

I wish to apologize to the Court in that I incorrectly inserted the phrase Summary Judgment in the statement of issue number two of Appellant's Brief.

Issue number two is correctly stated as follows:

2. Whether the district court erroneously denied the Motion for Preliminary Injunction.

Appellee recognized the error and correctly identified the Motion on page one (item 1) of the Brief of Appellee dated December 13, 1999.

REPLY

Prior to the preliminary injunction hearing I did timely file the following documentation which was entered into the court record:

A. Narrative reflecting upon the acts of harassment subsequent to the date of filing the Complaint with the district court (R1- 12 and R1-15).

B. Excerpt Doc. 25 (brown folder) which included the following items of most importance to the determination before the district court:

1. An extensive twenty page narrative with memorandum of Constitutional law and chronology of the threats, harassment and retaliation over the prior eight year period. On pages 19 and 20 of the narrative I did state the following:

"As a 100% service-connected disabled

veteran Plaintiff had a Constitutional right not to be threatened with physical injury under the analysis presented in *Washington v. Glucksberg.*"

I did reference the capable-of-repetition doctrine as presented by the Supreme Court in *City of Los Angeles v. Lyons, 103 S. Ct 1660 (1983)* due to the fact that the persons who had retaliated against me, threatened and harassed me in the past; still had direct and indirect supervisory authority over me.

2. Confirmation of my status as a 100% permanent and totally disabled veteran in correspondence from the Department of Veterans Affairs dated March 19, 1997.

3. Third-party confirmation of the physical threat by Ron Prowler against me (EEOC decision dated December 5, 1996 page 2).

4. Copies of the three EEO Complaints which I previously filed against the Secretary.

5. Refusal by the Secretary to investigate the threat by Ron Prowler because he had not provided physical injury to me (correspondence dated March 4, 1996 from the Department of the Treasury Regional Complaints Center).

6. Memorandum dated November 18, 1997 from the Division Chief requiring me to work for Ron Prowler if I wish to conduct CEP examinations. This requirement represented blatant retaliation under the circumstances.

7. Congressional review and confirmation of the abusive management "culture" which exists within the Internal Revenue Service.

R4-32 provides a transcript of the preliminary injunction hearing. The hearing was of short duration in that the Court informed me that "we don't have all morning to do this" (R4- 32 pg 6 lines 15, 16). I repeatedly claimed my Fifth Amendment Right to be free from threats of physical harm, harassment and retaliation. At the conclusion of the hearing the district court declared that my claim to Fifth Amendment protection was "emotional distress" and there was no legal reason or basis to grant an injunction (R4- 32 pg 17 lines 4 thru 18).

We cannot say with assurance that under the allegations of the pro se complaint which we hold to less stringent standard's than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief ". Haines v. Kerner, 92 S. Ct. 594 (1972).

Because my claim to a preliminary injunction arose under the Federal Constitution, the district court had jurisdiction over the subject matter of the case (28 U.S.C. sec. 1331 (1988)) and the same due diligence in safeguarding Constitutional rights as accepted by the United States Supreme Court in *Norris v. State of Alabama, 55 S. Ct. 579 (1935)*

The due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States government from invidious discrimination. Washington v. Davis, 96 S. Ct. 2040 (1976).

The standard for adjudicating claims of invidious racial discrimination under the due process clause of the Fifth Amendment is not identical to the standards applicable under the Equal Employment Opportunity Act. Washington, 96 S. Ct. at 2041.

The standard of review to the Order denying the request for preliminary injunction (R1- 27) is that of a clearly erroneous finding by the district court.

The district courts conclusion that my Fifth Amendment right to liberty had no legal basis and was properly characterized as "emotional distress" (R4- 32 pg 17 lines 4 thru 18) was an error of law and is properly reversed upon de novo review by the Appellate Court. Pullman-Standard v. Swint, 102 S. Ct. 1781 (1982). Findings of fact grounded on an erroneous view of the law do not bind the appeals court. Swint, 102 S. Ct. at 1789. The legal mistake has affected the challenged findings. Lincoln v. Board of Regents, 697 F. 2d 928 (11th Cir). Where findings are infirm because of an erroneous view of the law, a remand is proper course unless the record permits only one resolution of the factual issue. Swint, 102 S. Ct. at 1792.

The Secretary would have this Court believe this Complaint does not fall within the "genuinely extraordinary situation" envisioned by the United States Supreme Court in *Sampson v. Murray, 94 S. Ct. 937 (1974).* This Complaint, which encompasses eight years of physical threats, harassment, intimidation and retaliation by the United States Government against a one hundred percent (100%) disabled veteran with two artificial legs and loss of use of one hand, is unique, unconscionable, and therefore genuinely extraordinary.

ISSUE NUMBER THREE OF APPELLANT'S BRIEF

Whether the district court improperly dismissed my motion to amend the Complaint to include a claim of Constitutional deprivation of a fundamental and protected Fifth Amendment liberty interest by the United States Government.

REPLY

Secretary incorrectly argues on page 28 of Appellee's Brief that I failed to provide an argument relative to the issue and therefore I have waived said issue.

My argument on page 11 item three of Appellant's Brief does in fact reference a Fifth Circuit case which is binding precedent on the Eleventh Circuit. The referenced case does provide a conclusion by the Appellate Court that in the interest of justice the district court should have allowed the amendment to the Complaint which was presented during the summary judgment process.

The subject Motions (R3- 97 and R3-104) were properly filed with the district court and were referenced in Plaintiff's Response to Defendant's Motion For Summary Judgment (R3-107 pg 22 item 1).

In one broad sweep of the brush the district court did deny as moot "all other motions pending in this action" which did encompass the subject motions (R4-111 pg 8).

The grant or denial of an opportunity to amend pleadings pursuant to Federal Rules of Civil Procedure Rule 15(a) is within the discretion of the Federal District Court, but outright refusal to grant leave without any justifying reason appearing for the denial

is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules. Foman v. Davis, 83 S. Ct. 227 (1962).

ISSUE NUMBER FOUR OF APPELLANT'S BRIEF

Whether the district court abused its discretion in the granting of the request for summary judgment.

REPLY

Corrections to statement of the case by Secretary.

A. Course of proceedings and disposition in the court below:

(Page 2) The initial Complaint was brought under Title 42 U.S.C. sections 2000e-5, 2000e-16 (R1-1 pg. 4).

(Page 2) The allegation of retaliation was precipitated by the written requirement that I agree to work for Ron Prowler in order to conduct examinations of the largest and most complex entities (R1-1 pg 3, R2-89 deposition Deane Patrick Cox exhibit 3, R3-107 pg 18 item 8).

(Page 6) "The magistrate court conducted a hearing on Blough's motions to compel discovery on August 5, 1999, and resolved all outstanding discovery requests".

Not a true statement. During the discovery hearing on May 25, 1999 the Magistrate Judge did assure me that he would compel discovery (R5-60 pg 44 lines 17 thru 19). I was forced to file motions for sanctions under Rule 37(b)(2) FRCP (R3-101 and R3-109). The Rule 37 (b)(2) motion

was listed as a basis for denial of Defendant's motion for summary judgment (R3-107 pg 2 item 3, pg 20 and 21). The Rule 37(b)(2) motion was deemed moot by the district court's Order granting summary judgment (R3-111 pg 8).

(Page 6) "Blough responded to the Secretary's motion for summary judgment on September 10, 1999, reiterating the claims made in his motions to continue the district court's consideration of the Secretary's motion for summary judgment."

Not a true statement (R2-89 and R3-107). I moved for denial of motion for summary judgment (R3-107) based upon four considerations as opposed to the single factor presented for consideration in my request for continuance (R2-89).

B. Statement of the facts:

(Page 7) "Blough refrained from formally complaining about Prowler's behavior for more than two years".

Not a correct statement. I reported the threat to Division Chief, Terry Hallihan (R1-1 pg 2). Excerpt Doc 25 (narrative pg 11 and exhibit of Internal Revenue Service memorandum titled Employee Harassment dated September 23, My deposition of May 18, 1999 (R2-89 pg 36 line 19 thru pg 41 line 10/pg 47 line 21 thru pg 48 line 13). R2-89 document titled Acknowledgment of Conditions of Department (of Justice) Representation relative to Church of Scientology examination (provision 5 prevented me from filing EEO Complaint relative to the September 23, 1991 incident pending resolution of Scientology lawsuit September 3, 1993).

(Page 8) "Group 7212 did coordinated examination program work. Prowler's Group 7210 and the Baltimore group (number unknown) were the only ones handling CEP examinations."

Not a correct statement. During the period October 1, 1995 through September 30, 1997 the agents assigned to Prowlers Group 7210 did both CEP and regular examination program work. Group 7212 (Atlanta) and 7201 (Baltimore) did only CEP examinations (R2-75 my deposition of May 18, 1999 pg 83 line 6 thru pg 85 line 23).

(Page 9) "In 1995, Blough made a claim under the Rehabilitation Act for hostile work environment."

Not a correct statement. The 1995 EEO Complaint did complain of Title VII and Rehabilitation Act violations (Doc 25 exhibit brown folder).

(Page 9) In 1997 (not 1995) three CEP groups were authorized by the Regional Commissioner (not the Secretary).

(Page 10) "Cox then assigned Blough to Group 7210".

I requested Group 7210 to stay away from Prowler. (R2-75 my deposition May 25, 1999 pg 47 line 20 to pg 48 line 2).

(Page 10) "Blough, however continues to be assigned the work of a GS-13 revenue agent."

Not a true statement. Please refer to R2-66 Defendant's response to Plaintiff's Request

number 2 wherein it was admitted that gross receipts of assigned cases approximated $5 million. Please refer to the deposition of Division Chief Deane Patrick Cox wherein it is acknowledged that "I am not sure $5 million even qualifies as grade 13, quite candidly" (R2-89 deposition of June 28, 1999 pg 60 line 16 thru line 19).

(Page 10) "Blough maintains that his exclusion from CEP examinations constitutes retaliation for his previous Equal Employment Opportunity (EEO) activity."

Not a true statement. The retaliation took two forms, neither of which were addressed by the district court or the Secretary during the summary judgment process (R3-107 pg 14 item 1).

The deposition of Division Chief Cox on June 28, 1999 sheds light upon the various forms which the acts of retaliation took during the period October 1, 1997 to March 8, 1999 (R2-89):

Deposition exhibit 3 provides that I was required to work for Prowler to conduct CEP examinations. The authors of said memorandum (Division Chief Cox and Assistant Division Chief Breslin) were not uninformed management persons, but rather informed decision-makers who were personally informed by myself and Group Manager Farley of the 1991 and 1995 threats against me by Prowler (R2-89 exhibits and depositions of Farley, Cox and myself).

Said memorandum of November 18, 1997 references the August 27, 1997 memorandum

(R2-89 exhibit) from me which paraphrases the basis for which the Department of the Treasury denied my 1995 EEO Complaint (Doc 25 correspondence dated March 4, 1996). A copy of the November 18, 1997 memorandum was forwarded to the EEO Officer per notations at the bottom of the memorandum.

I did inform Division Chief Cox in August 1997 that I would not work for Prowler (R2-75 my deposition of May 25, 1999 pg 47 line 20 to pg 48 line 2).

Division Chief Cox acknowledges during his deposition that he is made aware when EEO Complaints are filed (R2-89 pg 10 line 18 to pg 11 line 6). The EEO Counseling Report dated September 10, 1997 reiterates my refusal to work for Prowler (Doc 25 exhibit brown folder).

The deposition of Division Chief Cox contains an extensive discussion of "Code 8 and Code 9 cases" (R2-89 pg 58 line 17 to pg 60 line 21). The following statement was presented by Division Chief Cox at R2-89 pg 63 line 3 to line 6:

> "and I think we should be -- in my personal opinion, we should be using grade 13 revenue agents to do the Code 8 and Code 9 cases that don't qualify as CEP".

C. Standard or scope of review.

I continue to believe the standard of review per page 8 of my initial brief to be correct.

I. Appellee's summary of the argument. Argument and citations of authority the district court did not abuse its discretion in denying Blough's motion for a preliminary injunction.

REPLY

See discussion per issue number two of this reply brief which I submit as the appropriate response to the above referenced argument.

II. Appellee's summary of the argument. Argument and citations of authority the district court did not err in granting the Secretary's motion for summary judgment.

REPLY

(Page 19) "A district court may resolve a dispositive motion prior to completion of all requested discovery when the record already is sufficient to allow resolution. Blough's pending requests for discovery would not have developed evidence to show that the Secretary's reason for the disputed assignments, the dispositive issue, was pretext. His pending requests were not relevant to the dispositive issue and were overly burdensome."

I am concerned as to the statements by the Secretary on page 20 "The Secretary had complied with the magistrate court's order prior to summary judgment" and the statements on the balance of pages 20 and 21. These statements are incorrect and I submit to the Court that R3-96, R3-101, R3-109 prove said statements to be in error.

I did in my response to defendant's motion for summary judgment specify that the following requests

were essential to respond to said motion (R3-107 pgs 2, 20, 21) and the basis for the requests:

A) Listing of Code 8 and Code 9 cases (R2-80 pgs 2, 3 and R3-107 pgs 14, 15).

B) Documentation of threats of injury by Prowler to employees. This request was essential to the disparate treatment test under Title VII claim, 1973 Rehabilitation Act claim, and the continuous violations/causal link between the prior EEO Complaints and the retaliation (R2-62 pgs 3, 4 and R3-107 pg 18 request).

C) Documentation of the administrative processing of my November 18, 1997 EEO Complaint within the Baltimore District Office (R2-82 pg 2 and R3-107 pgs 12, 13 request retaliation factor #3).

The above referenced documentation was essential to my response to Secretary's motion for summary judgment and were pending under a Magistrate Court Order (R3-96) at the time the district court judge rendered the motion for summary judgment (R3-111). The Order granting summary judgment (R3-111) addresses only my exclusion from CEP cases and ignores my exclusion from Code 8 and Code 9 cases. The Secretary's response within R2-80 pgs 2 and 3 indicates there were thousands of these types of entities which could have been assigned to me for examination and were not (R2-66 response to Plaintiff's request #2).

The documents in question would have affected the outcome of the motion for summary judgment and the district court deprived me of the opportunity to fully

respond to the motion for summary judgment as required in Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986).

(Page 23) "Blough did not either allege in complaint or establish in his response to the Secretary's motion for summary judgment that the Secretary had made any statement that showed an intent to discriminate against Blough on any prohibited basis."

The initial Complaint (R1-1 pg 3 second paragraph) references the November 18, 1997 memorandum from Division Chief Cox stating that I must agree to work for Prowler to conduct CEP examinations.

The response to the motion for summary judgment references the limitations of the November 18, 1997 memorandum from Division Chief Cox (R3-107 pg 12 first paragraph).

The memorandum of November 18, 1997 was devastating to me in that it was an affirmation (approval) by IRS management persons/decisions-makers Cox and Breslin of the prior physical threats by Prowler against me. Cox and Breslin were both knowledgeable as to the prior threats and said retaliatory memorandum was precisely the opposite of the relief I had requested in my prior EEO Complaints (i.e. no Prowler and I conduct CEP examinations). See prior EEO Complaints R2-89 exhibits.

I disagree with the district courts conclusion that "there were no material disputed facts which tend to show any casual link between the protected activity asserted and the adverse employment action as stated" (R3-111 pgs 6, 7). As I stated in my response to the motion for summary judgment --- Prowler was the link (R3-107 pgs 12, 13).

I disagree with the district courts conclusion that "Defendant has offered a legitimate, non-discriminatory reason for the 'adverse employment action' at issue. Group 7214 was not put under Prowler's supervision as a response to a mandate issued by the IRS's national office in 1997.

The claim that removal of CEP cases from the CEP program is cumbersome was disputed by me (R3-107 pgs 18, 19). The Internal Revenue Manual (R2-89 exhibit) provides that a CEP identified case may be excluded from the program "for any reason" and examined under the regular examination program. The Form 4791 exclusion form specified in Internal Revenue Manual section 7(10)(18)4.2(4) is a one page document (R2-89 exhibit).

The proffered explanation by Division Chief Cox for not excluding CEP qualified cases from the program changed when challenged during his deposition of June 28, 1999 (R2-89 exhibit pg 46 line 18 to pg 49 line 17). For purposes of the motion for summary judgment the process became "cumbersome". Under the facts and circumstances presented, I don't believe the phrase "cumbersome" would meet the test as evidence of a legitimate nondiscriminatory reason under Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981). "Cumbersome" is one step above "inconvenient" and I believe that neither is acceptable for purposes of summary judgment.

(Page 26) "The Secretary's employee, Division Chief Pat Cox, stated in his affidavit that he had made the complained-of assignments for legitimate business reasons." "Blough could participate in CEP cases elsewhere, but has declined to most recent opportunities".

I have extensive experience conducting examinations of CEP qualified entities and was restricted to the examination of the smallest entities from October 1, 1997 thru March 8, 1999 (R2-66). Said restriction was contrary to my OPM Standard Position Description which provides that I am to conduct examinations of the largest and most complex tax-exempt entities (R2-89 exhibit).

My annual performance evaluations since 1989 have been outstanding and I have received a variety of performance awards from the Department of Justice, IRS National Office, etc. (R2-89 exhibits).

Division Chief Cox acknowledges that there are more CEP examinations than the Division can do in the next one hundred (100) years and the CEP examinations are more successful than regular program examinations in obtaining taxpayer compliance (R2-89 Cox deposition).

No Code 8 or Code 9 examinations were assigned to me during the period October 1, 1997 to March 8, 1999. All cases assigned during this period were of low priority. This is in stark contrast to those cases assigned to me over the prior nine (9) year period (R2-66).

On March 8, 1999 I was assigned a high priority examination of a CEP qualified entity in Florida. Later that day I was offered and declined the audit of two CEP entities as a member of Group 7201 in Baltimore (Division Headquarters). I declined the out-of-state audits in that the assigned Florida examination was very large and complex. The offer begs the question of why I was not presented with an offer to work for the Group 7201 Baltimore manager during the period prior to March 8, 1999.

I find no legitimate business reason for the discriminatory conduct of the Secretary in that it was not directed to the business purpose of the Internal Revenue Service by insuring taxpayer compliance.

The "ultimate question" in a disparate treatment case is not whether the plaintiff established a prima facie case or demonstrated pretext, but whether the defendant intentionally discriminated against the Plaintiff. United States Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478 (1983).

CONCLUSION

Two hundred plus years ago Americans believed in principles which they thought were worth fighting and dying for. After the fighting was over they developed a Constitution and Bill of Rights to indemnify those principles. This Complaint is not about work assignments. This Complaint is about the abuse of those principles within the Internal Revenue Service as specified in the pleadings.

Thank you.

Respectfully submitted via certified mail this twenty-seventh day of December, 1999.

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL. 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan Roark Waldron this twenty-seventh day of December, 1999.

"S/Melvin E. Blough" pro se

99-2435-FF
99-13735-FF

CONSOLIDATED APPEAL

In The United States Court of Appeals For The Eleventh Circuit

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MELVIN E. BLOUGH,

Plaintiff-Appellant

versus

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

CONSOLIDATED APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION
(D.C. Docket NO. 98-01358-CV-T-24E)

PETITION FOR REHEARING EN BANC UNDER RULE 35 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

MELVIN E. BLOUGH
Pro Se - Appellant
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

BLOUGH v. SECRETARY, DEPARTMENT OF THE TREASURY

(11th Cir. - Consolidated Appeal No. 99-2435-FF and 99-13735-FF)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Roberta Bahnsen, Assistant United States Attorney, district court co-counsel for Secretary;

2. Melvin E. Blough, plaintiff-appellant, pro se;

3. Donna A. Bucella, United States Attorney;

4. The Honorable Susan C. Bucklew, United States District Judge;

5. Secretary of the Treasury, defendant-appellee;

6. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

7. Yvette Rhodes, Assistant United States Attorney, Appellate Division;

8. Susan Roark Waldron, Assistant United States Attorney, appellate counsel for Secretary.

9. The Honorable Charles R. Wilson, United States Circuit Judge, former United States Attorney

(interested solely in his capacity as former United States Attorney); and

10. Warren A. Zimmermam, Assistant United State Attorney, Chief, Civil Division, district court co -counsel.

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STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION:

1. Whether the district court improperly dismissed my motion to amend the Complaint to include a claim of constitutional deprivation of a fundamental and protected fifth amendment liberty interest by the United States Government.

2. Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

3. "Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*." Section 712 of the Civil Rights Act of 1964 (Title 42 U.S.C. section 2000e-11). Does recognition of the Constitutional right, as presented as issue number two above, provide a *special right* directed to totally and permanently disabled veterans in the employ of the United States Government ?

4. Whether the district court abused its discretion in the granting of the request for summary judgment.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE:

The district court did deny my request for a preliminary injunction and in a separate opinion did grant the Secretary's motion for summary judgment in my Complaints under Title VII of the Civil Rights Act

of 1964 and the Rehabilitation Act of 1973. The district court did concurrently deny as moot my motion to amend the initial Complaint to include a claim of Constitutional deprivation.

I did appeal both decisions and the appeals have been consolidated before this Court.

On May 9, 2000 a Panel of this Court did summarily deny my appeal based upon the findings of the district court.

On June 7, 2000 a clerical error did improperly precipitate issuance of a mandate by this Court as the time within which I may seek rehearing is forty-five days after entry of judgment in that an agency of the United States is party to this litigation. A motion to recall mandate was filed with the Court on June 10, 2000.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUENUMBER ONE:

The subject motions (R3-97 and R3-104) were properly filed with the district court and referenced in Plaintiff's Response to Defendant's Motion For Summary Judgment (R3-107 pg 22 item 1) in the Complaint of discrimination under Title VII of the Civil Rights Act of 1964.

The Order of the district court granting Agency motion for summary judgment (R3-111) did render moot all pending motions; including the motions to amend the Complaint to include a claim of constitutional tort against the United States Government (R3-97 and R3-104). The Order by the district court failed to state justification for the dismissal. The Brief of Appellee

and the Panel decision of this Court are also silent as to the justification for the dismissal.

ARGUMENT AND AUTHORITIES RELATIVE TO ISSUE NUMBER ONE:

In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. Murphy v. Hunt, 102 S. Ct. 1181 (1982).

We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today. Because the Court of Appeals erroneously applied the legal standard applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. Washington v. Davis, 96 S. Ct. 2040 (1976).

The District Court cannot, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of section1291. But the District Court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The abuse of that discretion remains reviewable by the Court of Appeals. Sears, Roebuck and Co. v. Mackey, 76 S. Ct. 895 (1956).

The grant or denial of an opportunity to amend pleadings pursuant to Federal Rules of Civil Procedure Rule 15(a) is within the discretion of the Federal District Court, but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion, and is merely abuse of

discretion and is inconsistent with the spirit of the Federal Rules. Foman v. Davis, 83 S. Ct. 227 (1962).

Absent any justifying reason; the district court ruled improperly (R3-111) that my motions (R3-97 and R3-104) to amend the Complaint were moot.

The motions in question were based upon direct evidence of intentional retaliation which is dispositive of all issues before the district court.

The issue is worthy of en banc consideration in that the silence of the district court and this Court has placed a cloud over the legal remedies available to me in my claim of constitutional tort against the United States Government and is an abuse of discretion which is inconsistent with the spirit of the Federal Rules as the United States Supreme Court has noted in *Foman, supra.*

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUE NUMBER TWO:

The Panel's decision is silent as to this question of law. A claim of constitutional deprivation of a protected liberty interest was presented within the motion for preliminary injunction (excerpt Doc. 25, R4-32). The decision by the district court was also silent as to the assertion of an established constitutional right (R1-28, R4-32).

I am one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs. I have two artificial legs and loss of use of one hand as a result of service in Vietnam (excerpt Doc. 25 correspondence dated 3/19/97 Department of Veterans Affairs).

ARGUMENT AND AUTHORITIES RELATIVE TO ISSUE NUMBER TWO:

The right is fundamental because it is preservative of all rights. Yick Wo v. Hopkins, 6 S. Ct. 1064; Harman v. Forssenius, 85 S. Ct. 1177 (1965).

Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful respect for the teachings of history and solid recognition of the basic values that underlie our society. Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932 (1997).

Washington v. Glucksberg, 117 S. Ct., 2258 (1997) as presented in Brief for Appellant at page 1.

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision on this **purely legal question** permits courts expeditiously to weed out suits which fail the test ....." Siegert v. Gilley, 111 S. Ct., 1789 (1991).

Based upon the standards established by the United States Supreme Court, I have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the same government which put me in harms way in Vietnam.

The American people have provided *special rights* and preferences to disabled veterans since the revolutionary war.

This issue warrants en banc consideration in that the United States Government has violated the constitutional rights of an American who became disabled in the service of his country. The constitutional rights of all Americans were therefore infringed upon.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUE NUMBER THREE:

I have been recognized by the federal government as a totally and permanently disabled veteran since 1971. I have been an employee of the federal government since 1979.

Secretary's opposition (R3-99) to my motions to amend the Complaint to include deprivation of constitutional liberty interest (R3-97 and R3-104) rests upon the claim of sovereign immunity and the assertion that Title VII of the 1964 Civil Rights Act constitutes the exclusive remedy for employment discrimination in the federal workplace under Brown v. General Services Administration, 96 S. Ct., 1961 (1976).

ARGUMENT AND AUTHORITIES RELATIVE TO ISSUE NUMBER THREE:

"It is only invidious discrimination which offends the Constitution". Ferguson v. Skrupa, 372 U.S. 726 (1963).

The United States Government has no claim to sovereign immunity in claims of invidious discrimination.

Discrimination may be so unjustifiable as to be violative of due process. Detroit Bank v. United States,

63 S. Ct. 297; Bolling v. Sharpe, 74 S. Ct. 693 (1954); Schneider v. Rusk, 84 S. Ct. 1187 (1964).

Unconstitutional federal employment discrimination was deemed actionable in the Federal Courts based upon a claim directed to the due process clause of the Fifth Amendment. Davis v. Passman, 99 S. Ct. 2264 (1979).

The United States Supreme Court did state in *Brown v. General Services Administration* that "federal employment discrimination clearly violated the Constitution" with citation to Bolling v. Sharpe, 74 S. Ct. 693 (1954).

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146 (1992).

"Generally, a law will survive scrutiny under the equal protection clause if the distinction rationally furthers a legitimate state purpose." Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

"Congress simply failed explicitly to describe section 717's position in the constellation of anti-discrimination law. We must, therefore, infer intent in less obvious ways." Brown v. General Services Administration, 96 S. Ct. 1961 (1976).

"Civil Rights Act of 1964, as amended, provides exclusive judicial remedy for claims of discrimination in federal employment". *Brown, supra.*

"Section 717 is now the exclusive remedy for charges of discrimination brought against federal employers." Porter v. Adams, 639 F.2d 273 (5th Cir. 3/13/81).

"Section 717 leaves undisturbed whatever remedies petitioner might otherwise possess." Davis v. Passman, 99 S. Ct. 2264 (1979).

Section 717 restriction on remedy was inferred by the United States Supreme Court in *Brown v. General Service Administration* ; however the language of Section 712 of Title VII is explicit, unambiguous and unchanged since Congressional enactment.

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII may restrict a veterans constitutional rights and the Courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

Reliance by the Secretary on *Brown v. General Service Administration, 96 S. Ct. 1961 (1976)* is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 and the finding by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights.

Section 712 of Title VII of the Civil Rights Act of 1964 (USC Title 42, Chapter 21, Subchapter VI, section 2000e-11) provides that Title VII is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of permanent and total disability. The fact said veteran is an employee of the United States Government should not deprive him of his Constitutional rights.

Section 712 of Title VII was not referenced in *Brown v. General Service Administration nor Porter v. Adams* and therefore was not a fact in consideration by the Courts.

Based upon the facts specific to this Complaint; en banc consideration is appropriate to resolve the conflict which exists between sections 712 and 717 of the Civil Rights Act of 1964, as amended.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUE NUMBER FOUR:

BASIS OF COMPLAINT

In the response the defendant's motion for summary judgment I did specify the basis for the Title VII Complaint to include direct evidence of retaliation (requirement to work for Prowler to conduct CEP examination as specified in the memorandum of Nov. 18, 1997 from Division Chief Cox R2-89 exhibit 3 deposition June 28, 1999) and evidence of indirect retaliation (i.e.no CEP or Code 8/9 examinations assigned and only the smallest cases were assigned 10/1/97 through 3/8/99). This claim was consistent with the allegations within the initial Complaint (R1-1-3).

"Specifically, plaintiff alleges that the re-organization which led to the creation of group 7214 was done in retaliation against him for his prior administrative and EEOC Complaints" (Order of district court granting summary judgment R3-111-3).

PRETEXT

During the deposition of June 28, 1999 (R2-89-26-27) Mr. Cox did explain in detail the basis for the

reorganization of the Division in 1997 and my response was "I understand. That's quite logical."

The following testimony was provided by me during the course of my deposition (R2-75-exhibit C pages 25-42) and focus upon the appointment of Prowler as CEP manager:

"Two acts of discrimination. Prowler CEP. I got to work for him if I want to do CEP. CEP sitting out there by themselves without Prowler as the manager, I still can't do them. There's two forms of discrimination. One, the actual act itself of appointing Prowler as the manager and saying if you work CEP, you work for Prowler. The other they're sitting out there. You can't do them non-CEP and work for another manager. There's two acts there."

"Prowler as the group manager in itself that's not retaliatory unless I'm compelled to work for him. But the fact is I was compelled to work for him if I wish to do CEP."

"The administrative acts referenced (reorganization of the Division and appointment of Prowler) do not relate to; however are being presented in an effort to justify retaliatory conduct on behalf of defendant" (my motion in opposition to summary judgment R3-107-16).

The following factual representations were presented during the deposition of Division Chief Cox on June 28, 1999 (R2-89):

Cox acknowledges statement of Nov. 16, 1998 that "there are 275 CEP - identified examinations in the southeast region and more in Florida than we can do in the next 100 years" (pages 43-44).

I inquired as to why no CEP examinations were initiated in northern, central or southwestern Florida during 1995-96-97-98 other than the one which I performed. Response by Cox: "We just didn't have the resources quite honestly" (pages 53-54).

I referenced the Internal Revenue Manual section which provides that CEP identified cases can be excluded from the program "for any reason" and provided a copy of IRM section 7(10)(18)4.2(2) (R2-89) to Cox. It had been acknowledged during the discovery process that none were excluded during the period 1995 through 1998 (R2-89) and I inquired as to why none were excluded in view of the fact that there were more in Florida than we can do in the next 100 years and I had been assigned cases below my grade level Oct. 1, 1997 through March 8, 1999. The response from Cox was that said examinations are very complex and can only be worked properly under the CEP program. I did respond that I had worked six CEP qualified cases (only one of which was conducted under the CEP program) and they can be done very effectively outside the CEP program. No response was provided by Cox (pages 45-49).

"The procedure for excepting cases from the (CEP) program is cumbersome and requires the ultimate approval of the national office." Declaration of Division Chief Cox (R2-77-5).

"Plaintiff recognizes that the procedure for excluding CEP cases and handling them through the regular program is a cumbersome one" Defendant's motion for summary judgment (R2-75-18). This is not a true statement and was denied in my response to the motion for summary judgment (R3-107-18).

THREATS

The initial Complaint (R1-1-2) references the 1991 and 1995 threats of physical injury to me by Group Manager Ron Prowler.

Secretary acknowledges in Answer to Complaint (R1-8-3,4) that no disciplinary actions were taken against Prowler regarding either threat.

Depositions of third-parties Gary Maxwell (R2-89-exhibit C pages 16, 17, 69-73) and Group Manager Genny Farley (R2-89-exhibit C pages 13, 14) attesting to the September 23, 1991 and September 21, 1995 threats of physical injury to me by Prowler.

Deposition of Melvin Blough (R2-75-exhibit B):

Testimony relative to threat by Prowler which occurred on September 23, 1991 (pages 46, 47).

Testimony relative to threat by Prowler which occurred on September 21, 1995 (pages 77-79).

Testimony regarding direct evidence of retaliation (pages 80-84):

"They never offered to allow me to work for another CEP manager or anything else. It was either you work for Prowler or that's it."

"It was in retaliation, right. Requiring me to work for an individual that had threatened me in the past, that's called -- that's retaliation."

The Division Chief's were notified of the threats by Prowler in a memorandum dated September 23, 1991 (R2-89) and a series of memorandums dated September 18, 1995 through July 7, 1998 in addition to the EEO Complaints of threats, discrimination,

harassment and retaliation 1993, 1995, 1997 (R2-89-exhibit B).

The following facts were acknowledged during the deposition of Division Chief Cox on June 28, 1999 (R2-89):

Decisionmakers Cox and Breslin (Asst. Div. Chief) were involved in the EEO Complaint resolution process (pages 10-11).

Cox/Breslin met with me during the summer of 1995 and I advised them of the 1991 threat by Prowler. Cox told me he would do everything in his power to insure that I did not work for Prowler in the future (page 12).

Cox acknowledges meeting with and being informed by Group Manager Genny Farley of the September 21, 1995 threat by Prowler (page 14).

I inquired of Division Chief Cox regarding the Memorandum of November 18, 1997 (exhibit 3 of deposition) authored by him and requiring me to work for Prowler to conduct examinations of entities within the CEP program:

"Given the prior threats by Mr. Prowler, what were you thinking to even suggest that I work for Ron Prowler" ? Response by Cox: "so I felt that you had a change of heart and you would be willing to work for Ron" (pages 33-35).

Review of the EEO Counseling Report obtained during the discovery process indicates that the author of the November 18, 1997 memorandum was advised by the EEO Counselor prior to the issuance of said memorandum that "Blough has made it clear that he does not want to work for Prowler due to comments

made by Prowler which were the issue of a previous EEO complaint."

DIRECT AND INDIRECT EVIDENCE OF RETALIATION

The initial Complaint (R1-1-3) and the Secretary's response in Answer to said Complaint (R-1-8-4) reference the memorandum dated November 18, 1997 (R2-89-Cox deposition June 28, 1999 exhibit 3) from Division Chief Cox requiring me to work under the supervision of Prowler if I wished to conduct examinations of the largest and most complex entities.

Secretary's motion for summary judgment (R2-75-3) notes that I was permitted to conduct a CEP audit in Florida and was supervised by a group manager in Atlanta (October 1, 1995 through September 30, 1997) subsequent to the September 21, 1995 threat by Prowler.

Under Court ordered discovery (R2-66), Secretary acknowledges that during the nine year period October 1, 1988 through September 30, 1997 sixty-three percent (63%) of my examination time was devoted to six (6) CEP examinations (largest and most complex) and thirty-one percent (31%) to Grade-13 non-CEP examinations. The annual gross receipts did range from $400 million to $1 billion. The Secretary also acknowledged that during the period October 1, 1997 through March 8, 1999 the average gross receipts of the tax returns assigned to me was $5 million.

On the morning of March 8, 1999 (fourteen months after filing EEO Complaint with the Secretary) I was assigned the examination of a coordinated examination program entity under the regular examination program (R3-107-17). On the afternoon of March 8, 1999 I was offered the opportunity to

participate in two CEP examinations, one in Richmond, Virginia and one in Washington, D.C. under the supervision of a group manager other than Prowler (Declaration of Cox R2-77-5).

Deposition of Division Chief Cox on June 28, 1999 (R2-89):

Discussion of failure to assign me Code 8 (annual gross receipt $10 million to $50 million) or Code 9 (annual gross receipts greater that $50 million; however non-CEP identified) cases for examination and fact that I was only assigned cases with average gross receipts of $5 million during the period October 1, 1997 through March 8, 1999. Response by Cox: " I am not sure $5 million even qualifies as grade 13 case (work) quite candidly" (pages 58-60).

Division Chief Cox acknowledges that he provided instructions to Branch Chief and my Group Manager regarding the assignment of cases to me (page 45).

Substantially all the available examination work for grade 13 Exempt Organization Revenue Agents are Code 8 (annual gross receipt $10 million to $50 million) and Code 9 cases (annual gross receipts in excess of $50 million).

DOCUMENTATION OUTSTANDING AT TIME SUMMARY JUDGMENT WAS RENDERED

My response to the motion for summary judgment did specify (R3-107- pages 2, 12, 19, 20) that documentation essential to my Complaint was outstanding pursuant to an Order of the district court (R3-96) and a Rule 37(B)(2) Motion before the district court (R3-109).

The outstanding documents were ordered by the district court (R3-96) after a lengthy discovery hearing at which the Magistrate Judge did provide extensive inquires of me as to the specifics of my claim and need for said documentation.

The court ordered and outstanding documentation was not provided (contrary to the assertion of Appellee in Brief to this Court) and were requested to secure documentation regarding direct evidence of retaliation by decisionmakers Cox and Breslin prior to the issuance of the memorandum of November 18, 1997, threats against other employees by Prowler, and the number/location of Code 8/Code 9 cases available for examination (prima facie case).

ARGUMENT AND AUTHORITIES RELATIVE TO ISSUE NUMBER FOUR:

Secretary, as moving party, has failed to negate an essential element of my claim (i.e. direct evidence of retaliation as presented in the record and pages 10-12 of this petition) and has therefore failed to properly support the motion for summary judgment. Adickes v. S.H. Kress & Co., 90 S. Ct. 1598 (1970).

Where a case of discrimination is made out by direct evidence, reliance on the four-part test developed for circumstantial evidence is obviously unnecessary. Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982).

The district court's misguided reference to the "reorganization" as the method of retaliation is erroneous (based upon facts in the record and pages 8-9 "pretext" of this petition). I have denied all inferences to warrant such conjecture by the district court and have in fact stated that the "reorganization"

and appointment of Prowler as CEP manager were not retaliatory; however requiring me to work for Prowler to conduct CEP examination was retaliatory.

In addition to the "reorganization" being offered as a legitimate business reason in requiring me to work for Prowler to conduct CEP examinations, Secretary has asserted that examinations could not be excluded from the CEP program because the exclusion process was "cumbersome" and required national office approval (see discussion of "pretext" pages 9-10 of this petition).

A) Division Chief Cox did claim a different pretext during his deposition pretext as presented in the record and page 9-10 of this petition).

B) The Internal Revenue Manual provides that CEP cases may be excluded from the program (and worked under the regular examination program) for "any reason" and the Form 4791 is a one page document (pretext as presented in the record and page 9 of this petition).

C) The fact that national office approval is required for exclusion should not by inferred as a difficult process.

D) Cox did acknowledge that the exclusion process was never attempted (pretext as presented in the record and page 9 of this petition).

E) Neither the reorganization nor the unsupported inference that the procedure for excluding CEP cases from the program is "cumbersome" present legitimate business reasons for the adverse employment actions of

the Secretary. Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981).

We have held that "articulating" a legitimate reason means adducing legally sufficient proof to rebut the plaintiff's proof. Jeffries v. Harris County Community Action Assn., 615 F.2d 1025 (5th Cir. (1980).

The evidence was sufficient to create a genuine issue of material fact as to pretext. See *Sparks*, 830 F.2d at 1564 (the implausibility of asserted justifications creates a genuine issue of material fact sufficient to preclude judgment as a matter of Law. Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993).

Neither the motion for summary judgment nor the Order by the district court address the additional acts of retaliation as presented in the record and pages 12-13 of this petition. The Secretary has again failed to negate essential elements of my claim by somehow articulating a legitimate business reason for the following adverse actions:

1. I was excluded from the examination of "Code 8 and Code 9" entities which does in fact comprise substantially all available grade 13 case work.

2. Secretary has acknowledged that I was assigned and limited to work below my grade level (grade 13) during the entire period October 1, 1997 through March 8, 1999.

3. I was not offered the opportunity to work for another CEP manager (other than Prowler) until March 8, 1999.

4. The adverse employment action was well documented in the record. As this Court observed in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d (11th Cir. 1986), "job titles and duties themselves are conditions of employment protected by Title VII."

The casual link between the protected activity and the adverse employment action was Prowler and the knowledge/actions of decisionmakers Cox and Breslin (R3-107-12). The knowledge/actions would include the threats by Prowler, EEO Complaints which I filed, and the memorandum of November 18, 1997 by Cox stating that I must work for Prowler to conduct CEP examinations (with knowledge that I would not agree to do so). The prima facie claim of retaliation was established.

The district court misstated the representations presented in the deposition of Cox and then compounded the error in stating said representation were undisputed (R3-111).

Please note the discussion on pages 13-14 of this petition regarding documentation which was outstanding at time summary judgment was rendered. The actions of the district court were an abuse of discretion based upon Anderson v. Liberty Lobby, Inc. 106 S. Ct. 2505 (1986); Patterson v. United States Postal Service, 901 F.2d 927 (11th Cir. 1990); Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992); Snook v. Trust Co. of Ga., 859 F.2d 865 (11th Cir. 1998).

En banc consideration is warranted based upon the standard that the district court's decision is not supported by the evidence and is clearly erroneous. Canino v. United States E.E.O.C., 707 F.2d 468 (11th Cir. 1983)

CONCLUSION

WHEREFORE, en banc consideration is respectfully requested to address the Federal question presented as issues one, two and three. The silence of the district court and this Court's Panel decision as to the basis for denying the Federal question is an abuse of discretion.

I know the difference between being slighted by the actions of another person versus being punished for my actions. I believe en banc de novo review of the facts and law relevant to issue number four will establish the necessity for trial.

Thank you.

Respectfully submitted under penalty of perjury this twenty-first day of June, 2000.

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL. 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan Roark Waldron the twenty-first day of June, 2000.

"S/Melvin E. Blough" pro se

(3)

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 01 203

AUG - 1 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
United States Department of the Treasury,
Paul H. O'Neill, Secretary of the Treasury,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Volume C

157 pp

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Melvin E. Blough

Plaintiff,

Case No. 8:00CV163-T-26E

v.

United States of America,
United States Department of the Treasury
Lawrence Summers, Secretary of the Treasury

Defendants,

COMPLAINT

1. PLAINTIFF:

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511

2. DEFENDANTS:

United States of America
United States Department of the Treasury
Lawrence Summers, Secretary of the Treasury
Building Annex Room 510
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

3. JURISDICTIONAL PLEA:

This Court has jurisdiction over the subject matter of this Complaint which alleges violations of plaintiff's Constitutional rights by the United States government (28 U.S.C. section 1331 (a)).

No administrative remedies were available within the Executive Branch of the United States Government to address plaintiff's allegations. The Judicial, as opposed to the Executive or Legislative Branches of the Federal government, is charged with the duty to interpret the legitimate rights of plaintiff under the Constitution of the United States.

A limited number of the facts presented in this Complaint are also the basis of a civil rights Complaint presented to this Court under the provisions of Title VII of the Civil Rights Act of 1964, as amended (Case No. 98-1358-CIV-T-24E). The conclusions by the Court in the matter of Melvin E. Blough v. Lawrence Summer, Secretary of the Treasury; are currently under appeal to the United States Court of Appeals for the Eleventh Circuit (Case No. 99-13735-FF).

The Court did fail to address the specific allegations of Constitutional rights violations which were presented as an amendment to the above referenced Complaint of civil rights violations. "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today" Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in this Complaint under the "constitutional standards" required by the United States Supreme Court in**

Washington v. Davis, supra.

Plaintiff deems it necessary to initiate this Complaint to preserve the facts within the statute of limitations and address the silence of this Court which has placed a cloud over the legal remedies available to Plaintiff in this claim of constitutional tort against the United States Government.

The following observation by Justice Harlan was paraphrased in *Davis v. Passman,* 99 S. Ct. 2264 (1979) wherein the United States Supreme Court found that unconstitutional federal employment discrimination is deemed actionable in the Federal Courts based upon a claim directed to the due process clause of the Fifth Amendment:

> "Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles" Bivens v. Six Unknown Named Agents Of Fed. Bur. Of Narc, 91 S. Ct. 1999 (1971).

4. ALLEGATION:

The United States of America did violate Plaintiff's Constitutional right as a totally and permanently disabled veteran to be secure in a fundamental and protected Fifth Amendment liberty interest. The violations did manifest as continuous acts of

employment related threats of physical injury, harassment and retaliation over a nine year period.

5. FACTS IN SUPPORT OF ALLEGATION:

Plaintiff is one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs. Plaintiff has two artificial legs and loss of use of one hand as a result of service in Vietnam. The United States of America has since 1970 accepted full responsibility and liability for the aforementioned status of Plaintiff.

Plaintiff has been employed by the United States Department of the Treasury (Internal Revenue Service) since 1979 as an Internal Revenue Agent and has never been the subject of disciplinary action by the employer. In 1989 Plaintiff was promoted to a grade 13 Internal Revenue Agent and has consistently to this date received outstanding annual performance evaluations and a variety of performance awards from the Department of Justice and the National/Divisional Offices of the Internal Revenue Service.

The genesis of the Complaint occurred in 1991 and did precipitate a chain reaction of threatening and retaliatory actions against Plaintiff which continue to the present.

On September 23, 1991 Internal Revenue Service (IRS) Group Manager Ron Prowler (Prowler) did put his fist in Plaintiff's face and back Plaintiff against a row of file cabinets when Plaintiff refused his request for a listing of confidential informants which had been developed by Plaintiff in a very sensitive examination and whose safety was of concern to Plaintiff. The abusive conduct of Prowler

has been confirmed by the sworn testimony of IRS Agent Gary Maxwell. The threat of physical injury was reported to Division Chief Terry Hailihan in a memorandum dated September 23, 1991. The employer did not investigate the threat and no disciplinary actions were taken against Prowler. Plaintiff had no further contact with Prowler as Prowler had been assigned to another group prior to the September 23, 1991 threat.

Prowler's replacement as group manager (Melanie Clark) was a good friend of Prowler's having worked together in Miami. Ms. Clark's attitude toward Plaintiff changed after the September 23, 1991 threat by Prowler and she harassed Plaintiff on multiple occasions until her forced resignation as group manager in December 1993 (harassing another agent in the group). On October 14, 1993 Plaintiff did file a complaint of employment discrimination against Prowler and Clark which referenced the 1991 threat by Prowler. The complaint was withdrawn in December 1993 upon the resignation of Clark. Plaintiff incorrectly assumed that Prowler wouldn't be able to get to him once Clark was gone.

During the years 1992 and 1993 Plaintiff was assigned very small grade 13 examinations by Clark (i.e. minimum gross receipts and assets). No large and complex examinations were assigned to Plaintiff.

On September 18, 1995 Plaintiff notified (verbally and in writing) the new Division Chief (Pat Cox) of the previous threat by Prowler and requested that Prowler not be assigned supervisory authority over Plaintiff.

On September 21, 1995 Prowler met with Plaintiff's

(then) current manager (Genny Farley) and went into a long dissertation on how much he hated Plaintiff and stated "he would push (Plaintiff) down a flight of stairs if he thought he could get away with it". Ms. Farley was concerned as to the safety of Plaintiff and immediately informed Plaintiff of the threat. The threat by Prowler has been confirmed by the sworn testimony of Genny Farley. Ms. Farley also stated that she personally informed Division Chief Pat Cox of the threat against Plaintiff by Prowler and sworn testimony by Pat Cox provides confirmation as to said notification.

Plaintiff called the IRS Inspection Service upon being notified of the threat by Prowler and was informed that nothing could be done unless Prowler assaulted Plaintiff. The IRS Inspection Service did then prepare and forward a memorandum to the District Director regarding the reported threat by Prowler. The employer did not investigate the threat and no disciplinary actions were taken against Prowler. Plaintiff was not required to work for Prowler and was assigned to a group manager with no allegiance to Prowler until October 1, 1997.

On December 19, 1995 Plaintiff filed a discrimination complaint under 29 CFR PART 1614 with the United States Department of the Treasury (employer) complaining of the September 21, 1995 threat of physical injury be Prowler. Plaintiff's complaint was not accepted for investigation by the employer and the Equal Employment Opportunity Commission subsequently affirmed the rejection of the complaint on the following basis -

> "a complainant must point to an 'injury in fact' in order to be aggrieved. Simple conjecture as to alleged future injury is not sufficient"

The United States Government has taken the position that the threats by Prowler did not provide injury to Plaintiff or violate Plaintiff's rights. It was necessary that Prowler physically injure Plaintiff before Plaintiff's rights were deemed to have been violated under the stated position of the United States Government.

The threats by Prowler against Plaintiff in 1991 and 1995 were taken seriously by Plaintiff, having experienced his rage first-hand. The threats by Prowler were physical (inflict pain) as opposed to administrative (demotion, suspension, etc.). The threats were directed to Plaintiff's most vulnerable characteristic (i.e. disability). According to the Penalty Guidelines in the Handbook of Employee Conduct and Ethical Behavior, Prowler should have been reprimanded for the 1991 threat and dismissed for the 1995 threat; however given the culture which existed then and continues to exist within IRS management, he was protected and promoted. The threats by Prowler and the harassment/retaliation by IRS management persons has taken a toll upon Plaintiff both mentally and physically since 1991. Plaintiff continues to fear the violent nature of Prowler and the vindictive nature of IRS management.

From October 1, 1997 to the present Plaintiff has been working under the direction and control of Group Manager Teresita M. Rodriguez. In anticipation of becoming the manager of the group conducting examinations of the largest and most complex tax-exempt organizations in Florida (Coordinated Examination Program or "CEP" examinations), Prowler did recruit and promote the selection of Ms. Rodriguez to fill the group manager position he was about to vacate.

Ms. Rodriguez was a good friend of Prowler's having worked together in Miami. Ms Rodriguez did harass Plaintiff on multiple occasions during her tenure as Group Manager and did work in conjunction with IRS management persons to restrict the examinations assigned to Plaintiff, to those examinations below Plaintiff's working grade level during the period October 1, 1997 through March 7, Ms. Rodriguez did also subject all examinations completed by Plaintiff to one hundred percent review upon closing. This action was taken immediately after Plaintiff filed the Complaint of civil rights violations with this Court. The IRS agent assigned to review Plaintiff's closed examinations refused to be a party to such disparate treatment in view of the fact less than three percent of closed examinations are randomly selected for review.

On November 18, 1997 Plaintiff was informed in writing by the Division Chief (Pat Cox) that the only way Plaintiff would be permitted to continue conducting examinations of the largest and most complex entities (i.e. CEP examinations) was to make application to work for Prowler. The authors of the November 18, 1997 memorandum (Division Chief Cox and Assistant Division Chief Breslin) were not uninformed management persons, but rather informed decisionmakers who were personally informed by Plaintiff and Group Manager Genny Farley of the 1991 and 1995 threats against Plaintiff by Prowler. Immediately prior to the issuance of the November 18, 1997 memorandum; the authors were also informed by EEO Counselor Ginger King that Plaintiff would not work for Prowler due to the prior threats. The memorandum of November 18, 1997 was devastating to Plaintiff in that it was an affirmation (approval) by informed IRS management persons/decisionmakers Cox and

Breslin of the prior physical threats by Prowler against Plaintiff.

On November 18, 1997 Plaintiff did file a third discrimination complaint with the United States Department of the Treasury under 29 CFR PART 1614 based upon a claim of retaliation by IRS management for the December 19, 1995 complaint filed with the United States Department of the Treasury and the Equal Employment Opportunity Commission.

The November 18, 1997 complaint (retaliation) was directly and transactionally related to the December 19, 1995 complaint in that Internal Revenue Service management ignored and accepted the threats by Prowler against Plaintiff and then maliciously required Plaintiff to work under the supervision of Prowler if he wished to conduct the same types of examinations which he had conducted under the supervision of other managers during the period February 1989 through September 1997 (with the exception of 1992 and 1993 when Plaintiff was under the supervision of Melanie Clark).

The United States Government Department of the Treasury failed to timely bring final action on the complaint of November 18, 1997 (retaliation) and Plaintiff did on June 29, 1998 initiate civil action with this Court as provided in 42 U.S.C. 2000e-16 (c). The United State Department of the Treasury has acknowledged that during the nine year period October 1, 1988 through September 30, 1997 sixty-three percent (63%) of Plaintiff's examination time was devoted to six (6) CEP examinations (largest and most complex) and thirty-one percent (31%) to Grade 13 non-CEP examinations. The annual gross receipts did range from $400 million

to $1 billion (with exception for the years 1992 and 1993). The United States Department of the Treasury has also acknowledged that during the period October 1, 1997 through March 7, 1999 the average gross receipts of those tax returns assigned to Plaintiff was $5 million. The large case examination assigned to Plaintiff on March 8, 1999 continues to this date and is consistent in duration to other large case examinations conducted by Plaintiff. In sworn testimony Division Chief Cox did acknowledge that he provided instruction to Group Manager Rodriguez and others regarding the assignment of work to Plaintiff subsequent to October 1, 1997. Division Chief Cox also acknowledged that the tax returns assigned to Plaintiff were below his working grade level during the period October 1, 1997 through March 7, 1999.

Plaintiff has been harassed and retaliated against for reporting the threats by Prowler. Said conduct is consistent with the findings of the Senate Finance Committees relative to the IRS. The abusive culture which exists within management at the IRS is documented in the following testimony. These were not disgruntled employees, but rather Departmental witnesses acknowledging the abusive practices of IRS management at Hearings Before the Committee on Finance United States Senate (April 28, 1998):

Mr. Richard Calahan (Deputy Inspector General, Office of the Inspector General Department of the Treasury) -

> "I.R.S. management appears to treat managers differently than employee when it pertains to disciplinary actions".

Yvonne D. DesJardins (Chief, Employee and Labor Relations Section, Personnel Branch, Internal Revenue Service) -

> "I can only speak from my personal experiences and observations since working for the I.R.S. Unfortunately, a good portion of what I have observed leaves much to be desired when it comes to consistent treatment of individuals regarding discipline and the manner in which the I.R.S. deals with whistleblowers.
>
> The whistleblowers are ostracized and careers destroyed, and those senior officials who engaged in the misconduct which was reported and substantiated are not only protected from receiving any disciplinary actions, but are oftentimes rewarded during the same year the misconduct occurs. Again, I speak from personal experience."

The following government publications are replete with sworn testimony regarding the abusive management culture which has and continues to exist within the Internal Revenue Service:

1. HEARINGS BEFORE THE SUBCOMMITTEE ON THE CIVIL SERVICE OF THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES (September 10 and 25, 1997).

2. HEARINGS BEFORE THE COMMITTEE ON FINANCE UNITED STATES SENATE ON H.R. 2676 (January 28,29; February 5, 11, 25, 1998 and April 28, 29, 30 and May 1, 1998).

The Commissioner's Semi-Annual Disciplinary Actions Report 1996 -1999 demonstrates the inequities in the application of disciplinary actions against employees versus IRS management persons. Each case number represents an "alert" and the number of reported cases are in excess of three thousand (3,000). The United States Department of the Treasury has stated that Prowler has three "alerts" on record and none of the three "alerts" was initiated with regard to the threats against Plaintiff.

6. RELIEF:

The United States Supreme Court did observe in *Chas. C. Steward Mach. Co. v. Davis,57 S. Ct. 883(1937)* "that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment".

The first time I felt handicapped after Vietnam was on September 23, 1991 when Group Manager Prowler put his fist in my face and backed me against those file cabinets. He took something special away from me that day and in doing so violated my rights under the Fifth Amendment. The United States Government was notified and chose to ignore the violation.

The written response by the Department of the Treasury and the Equal Employment Opportunity Commission to the September 21, 1995 threat by Group Manager Prowler to "push me down a flight of stair if he thought he could get away with it" was that he didn't follow through on the threat and therefore no harm was done. Again my Fifth Amendment rights were violated with the concurrence of the United States Government.

The threats of physical injury to me by Group Manager Prowler were ignored in that Prowler was part of an abusive management culture which did in fact condone his actions and retaliate against me for reporting the threats. I have endured nine years of threats, harassment and retaliation as an employee of the Federal government. I realize that it is not the individuals (Ron Prowler, Pat Cox, Peter Breslin, Terry Rodriquez , Mike Rachael, etc.) that are to blame, but rather the United States Government which by its actions and inactions has encouraged said abuse.

The conduct of the United States Government is conscious shocking in the Constitutional sense and the remedy should be commensurate. That the United States Government, as the employer, would create and condone a work environment in which a totally and permanently disabled veteran is threatened with physical injury on multiple occasions and then retaliated against and harassed for reporting the threats is equivalent to confiscation of that persons liberty interest and subject under the Fifth Amendment to challenge and annulment.

WHEREFORE, compensatory damages in the amount of ten million dollars ($10,000,000) are sought and trial by jury is requested.

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH

Plaintiff,

Case No. 8:00CV1631-T-26E

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY, LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendants.

_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS PROVIDED UNDER COURT ORDER OF OCTOBER 17, 2000.

Plaintiff, Melvin E. Blough, hereby moves for denial of summary judgment under Fed. R. Civ. P. 56 on grounds that this is not a *Bevins* action, the doctrine of res judicata does not apply, and Plaintiff is not barred from initiating a cause of action under the Fifth Amendment to the United States Constitution. In

support hereof, plaintiff respectfully presents the following:

MEMORANDUM OF LAW

I. INTRODUCTION

This is a claim for damages against the United States Government/Department of the Treasury for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

II. FACTS

The facts as presented are limited to those necessary to address the instant motion for summary judgment.

RES JUDICATA

The complaint initially filed with this court in 1998 did encompass a claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (Document No. 1). Plaintiff did timely file motions to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (Documents No. 33, 36, 49, 54, 106), and a claim of constitutional tort against the United States Government (Documents No. 97, 99, 104). This court did concurrently grant Defendants motion for summary judgment in the complaints of Civil Rights and Rehabilitation Act violations; however failed to take judicial notice of the timely filed motion to amend the initial complaint (under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure) to

include a claim of constitutional tort by the United States Government (Documents No. 97, 99, 104).

Neither the district court nor the appellate court have ruled on the merits of this complaint of constitutional tort (Exhibit C) which was properly filed in conjunction with the initial complaint (Document No. 1). This fact is evident upon review of the Order by the district court (Document No. 111) and the appellate court (Exhibit B) in that said decisions were limited to the alleged violations under Title VII of the Civil Rights Act of 1964, as amended, (Document No. 1) and the motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (Documents No. 33, 36, 49, 54, 106). The Order by the district court (Document No. 111 page 8) specifically states "Plaintiff's Motion to Amend Complaint (Doc. No. 33) is denied for the reasons set forth in this Order".

A claim of deprivation of a protected Fifth Amendment liberty interest by the Defendant was raised by Plaintiff during the course of a preliminary injunction hearing (Document No. 32 pages 8, 9,17).

The following statements were presented in plaintiff's motion for leave to amend the initial complaint (Document No. 97 page 2) under rule 15(a):

"Plaintiff has met the "relation back" doctrine under Rule 15(c)(2) of the Federal Rules of Civil Procedure in that the initial Complaint did reference the fear experienced by Plaintiff and threats, harassment and retaliation directed to Plaintiff by agents of Defendant since 1991."

"The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and

retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

The court did by Order dated August 30, 1999 permit Plaintiff to submit a memorandum in support of the motion to amend the initial complaint to bring action under the Rehabilitation Act of 1973 (Documents No. 102, 106); however was silent as to Plaintiff's motion of August 9, 1999 to amend the initial complaint to include a clai mof constitutional tort (Documents No. 97, 99, 104).

The following statements were presented in Plaintiff's response to Defendant's motion for summary judgment (Document No. 107 pages 2 and 22):

> "Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint."
>
> "Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. **The facts are consistent with each route; however the law and remedies differ** (emphasis added).
>
> 1. Deprivation of a fundamental and protected liberty interest which exists

within the Fifth Amendment to the United States Constitution.

2. Unlawful intentional discrimination which is prohibited under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

3. Unlawful intentional discrimination which is prohibited under the Rehabilitation Act of 1973, as amended.

The same parties are presented in this complaint of constitutional tort and A) the initial complaint alleging violations under Title VII of the Civil Rights Act of 1964, as amended, B) the motion to amend the initial complaint to include the Rehabilitation Act of 1973, and C) the motion to amend the initial complaint to include a claim of constitutional tort against the United States Government. This complaint of constitutional tort arose out of the same nucleus of conduct, transactions and occurrences set forth in A) the initial complaint of discrimination under Title VII of the Civil Rights Act of 1964, as amended, B) the motion to amend the initial complaint to include the Rehabilitation Act of 1973, and C) the motion to amend the initial complaint to include a claim of constitutional tort against the United States Government.

STATUS OF PLAINTIFF PROVIDING FOR CONSTITUTIONALLYPROTECTED LIBERTY INTEREST

Plaintiff is one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs (source: Department of Veterans Affairs FY 1998 Annual Report). Plaintiff has two artificial legs

and loss of use of one hand as a result of service in Vietnam (Document No. 25 exhibit I). The United States Government has since 1970 accepted full responsibility and liability for the aforementioned status of Plaintiff.

Plaintiff has been employed by the United States Government/Department of the Treasury since 1979 as an Internal Revenue Agent. Plaintiff has never been the subject of disciplinary action by the employer and has consistently to this date received outstanding annual performance evaluations (Document No. 25 exhibit A).

III. APPLICABLE LEGAL STANDARDS

A. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc. 106 S. Ct 2505, 2510 (1986).

The moving party has the burden to establish the absence of a genuine issue as to any material fact. Tyson Foods, Inc., 121 F.3d at 646 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)). The moving party may discharge this burden by "showing' - tha tis, pointing out to the District Court - tha t here is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2554 (1986). In deciding whether the burden has been satisfied, this Honorable Court must view the evidence and all reasonable inferences arising from it in the light most favorable to the nonmoving

party. Tyson Foods, Inc., 121 F.3d at 646 (citing Adickes, 398 U.S. at 157).

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

B. Res judicata

"Judgment on merits is conclusive, and bars subsequent action between same parties on the same question, claim, or demand, and also concludes parties on different claim or demand which involves same question as litigated in original action". United States v. Moser, 45 S. Ct. 66 (1924).

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ...." *Southern Pacific R. Co. v. United States*, 18 S. Ct. 18 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same

cause of action. *Cromwell v. County of Sac*, 94 U.S. 351 (1877). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra*, 18 S. Ct., at 27. **To preclude parties from contesting matters that they have had a full and fair opportunity to litigate** (emphasis added) protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. U.S., 99 S. Ct. 970 (1979).

"**The purpose behind the doctrine of res judicata is that the 'full and fair opportunity to litigate** (emphasis added) protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial actions by minimizing the possibility of inconsistent decisions.' Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999) (quoting Montana, supra). Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding. *Citibank, N.A. V. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir. 1990).

"Under Eleventh Circuit precedent, a claim will be barred by prior litigation if all four of the following elements are present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." Ragsdale, supra at 1238.

"In the Eleventh Circuit, '[t]he principal test for determining whether the causes of action are the

same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form'. 'It is now said, **in general** (emphasis added), that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as the former action, that the two cases are really the same 'claim or cause of action' for purposes of res judicata". Ragsdale, 193 F.3d at 1239 (quoting Citibank, supra).

"We must [therefore] look to the factual issues to be resolved [in Rubbermaid II], and compare them with the issues explored in Rubbermaid I. *Id.* Did they arise out of the same transaction or series of transactions? Could Miller have brought his retaliation claim when he brought his *qui tam* claim?" Ragsdale, 193 F3d. at 1239.

The Supreme Court, Mr. Justice White, held that standards applicable to equal employment opportunity cases should not have been applied in resolving issue whether the test violated due process clause of the Fifth Amendment. Washington v. Davis, 96 S. Ct. 2040 (**Decided June 7, 1976).**

"We are of the opinion that the amendment was properly permitted. Rule 15(c) of the Federal Rules of Civil Procedure ... provides that 'Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Tiller v. Atlantic Coast Line R. Co., 65 S. Ct. 421, 424 (1945). "The grant or denial of an opportunity to amend pleadings pursuant to Federal Civil Procedure Rule 15(a) is within the discretion of the Federal District Court, but outright refusal to grant leave without any justifying reason appearing for

the denial is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules." Foman v. Davis, 83 S. Ct. at 224 (1962).

"In general a case becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Murphy v. Hunt, 102 S. Ct. at 1183 (1982) (quoting United States Parole Comm'n v. Geraghty, 100 S. Ct. at 1208 (1980). "The defendant is free to return to his old ways. This together with the public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right." United States v. W. T. Grant Co., 73 S. Ct. 894, 897 (1953). "The District Court *cannot*, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of section 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. Sears, Roebuck and Co. v. MacKey, 76 S. Ct. 895, 900 (1956).

C. Federal Question

1. United States/United States Department of the Treasury as party defendant.

The test of whether an action is against an officer individually or against the United States is not the denomination of the party by the plaintiff, but whether relief sought is against the United States. Larson v. Domestic & Foreign Commerce Corporation, 69 S. Ct. 1457 (1949).

"It is argued that the principal of sovereign immunity is an archaic hang-over not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend (citing Brooks v. United States, 69 S. Ct. 918). But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for the wrong done to him by the Government. It is far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act." Larson, 69 S. Ct. at 1468.

"Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. Larson, 69 S. Ct. at 1468.

Interpretation of the same words in different statutes may vary with the consequences, for such consequences may provide insight for determination of congressional purpose. "We brought the case here on certiorari because of its importance as an interpretation of the Act. It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." Brooks v, United States, 69 S. Ct. 918 (1949).

2. Section 717 of Title VII of the Civil Rights Act of 1964, as amended.

"The primary question in this litigation is not difficult to state: Is section 717 of the Civil Rights Act

of 1964, as added by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. section 2000e-16 the exclusive individual remedy available to a federal employee complaining of job-related discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe section 717's position in the constellation of antidiscrimination law. We must, therefor, infer congressional intent in less obvious ways. Brown v. General Services Administration, 96 S. Ct. 1961 (**Decided June 1, 1976).**

Federal employment discrimination clearly violated the Constitution before passage of the 1972 Act. Brown v. General Services Administration, 96 S. Ct. at 1964 (citing *Bolling v. Sharpe*, 74 S. Ct. 693 (1954).

"Section 717(a) provides that all **personnel actions** (emphasis added) affecting federal employees and applicants for federal employment 'shall be made free from any discrimination based on race, color, religion, sex, or national origin.'" Brown v. General Services Administration, 96 S. Ct. at 1966.

"The petitioner relies upon our decision in *Johnson v. Railway Express Agency*, 95 S. Ct. 1716 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon **the explicit legislative history of the 1964 Act which "' manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and**

federal statutes.'" (emphasis added) 95 S. Ct. at 1719 quoting *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011, 1019-20. **There is no such legislative history behind the 1972 amendments.** (emphasis added). Indeed, as indicated above, the congressional understanding was precisely to the contrary. Brown v. General Services Administration, 96 S. Ct. at 1968.

"In the case at bar, as in *Preiser* and the other cases cited above, the established principal leads unerringly to the conclusion that section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. at 1969.

"Because we conclude that section 717 bars reprisals against federal employees who file charges of discrimination, appellant must bring her action under that section." Porter v. Adams, 639 F.2d 273 (U.S.C.A 5th Cir. 3/13/81) (citing Brown v. GSA, 96 S. Ct. at 1969).

"Like the plaintiffs in *Bolling v. Sharp*, supra, petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. There is in this case 'no *explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." Davis v. Passman, 99 S. Ct. 2264, 2276, 2278 (1979) (citing Bivens v. Six Unknown Federal Narcotics Agents, 91 S. Ct. 1999 (1971)). **"On the contrary, section 717 leaves undisturbed whatever remedies petitioner might otherwise possess."** (emphasis added) Davis v. Passman, 96 S. Ct. at 2278.

3. Section 712 of Title VII of the Civil Rights Act of 1964.

"Nothing contained in this title shall be construed to repeal or modify any **Federal,** State, territorial, or local **law creating special rights** or preference **for veterans**. (emphasis added). Public Law 88-352, July 2, 1964 ("Civil Rights Act of 1964").

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibilities in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provision of the whole law, and to its object and policy." Richards v. United States, 82 S. Ct. 585, 591 (1962).

The following statements by Senator McCarthy appear in the Congressional Record June 19, 1964 in regard to the Civil Rights Act of 1964:

> "The search for freedom and for a world in which freedom and equality can be enjoyed has been a preoccupation of civilized people throughout the history of the world. Certainly, it has been a preoccupation of Americans since this country was first settled. One man has said: once we have declared for liberty and for freedom and for equality, we have declared for an unending war in an unending revolution. Certainly, we in the United States have declared more often, more consistently and more loudly, for equality, for liberty and freedom; and consequently, we must bear the burden of that revolution and give the example.
>
> These rights were claimed on the basis of the nature of man and the nature of a person. All of

> these rights to which we now refer today, on another occasion were declared to be the inalienable rights of all men. These civil rights do not derive because of law but, rather, derive from the very nature of man himself. They have their basis and they rest in that nature. We have made these basic human rights civil rights, and we have sought to guarantee and protect them through the Constitution of the United States and of the States, and through the laws of the land."

The equal employment provisions of the Civil Rights Act were designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. Alexander v. Gardner-Denver Co., 94 S. Ct. 1011 (1974). "Generally, a law will survive scrutiny under the equal protection clause if the distinction rationally furthers a legitimate state purpose." Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (citing Rubin v. United States, 101 S. Ct. 698,701 (1981).

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' Ginsberg & Sons v. Popkin, 52 S. Ct. 322." Fourco Glass Co. v. Transmirra Products Corp., 77 S. Ct. 787, 791 (1957).

4. Protected liberty interest under the Fifth Amendment to the United States Constitution.

"Due Process Claim. The government may not deprive any person of 'life, liberty or property without due process of law.' U.S. Const. amend. To prevail upon its procedural due process claim, BJC must establish: (1) **a constitutionally protected interest in life, liberty or property** (emphasis added); (2) government deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation." Bank of Jackson County v. Cherry, 980 F.2d 1362 (11th Cir. 1993) (citing Lehr v. Robertson, 103 S. Ct. 2985,2990 (1983).

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of the **purely legal question** (emphasis added) permits courts expeditiously to weed out suits which fail the test." Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991).

"Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society. Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932, 1937 (1977) (citing Griswold v. Connecticut, 85 S. Ct. at 1691.

"The right is fundamental 'because preservative of all rights.'" Harman v. Forssenius, 85 S. Ct. 1177, 1183 (1965) (citing Yick Wo v. Hopkins, 6 S. Ct. 1064).

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling v. Sharpe, 74 S. Ct. 693 (1954).

"Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' *id.*, 97 S. Ct. at 1938; *Snyder v. Massachusetts,* 54 s. Ct. 330 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty', such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut,* 58 S. Ct. 149 (1937). Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' Collins, 112 S. Ct. at 1068, that direct and restrain our exposition of the Due Process Clause. Washington v. Glucksberg, 117 S. Ct. 2258, 2269 (1997).

"Discrimination may be so unjustifiable as to be violative of due process." United States v. Gilman, 74 S. Ct. 695 (1954) (citing Detroit Bank v. United States, 63 S. Ct. 297; Currin v. Wallace, 59 S. Ct. 379; Steward Machine Co. v. Davis, 57 S. Ct. 883). "It is only invidious discrimination which offends the Constitution". Ferguson v. Skrupa, 372 U.S. 726 (1963).

The due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States government from invidious discrimination. Washington v. Davis, 96 S. Ct. 2040 (1976). Unconstitutional federal employment discrimination was deemed actionable in the Federal Courts based upon a claim directed to the due process clause of the Fifth Amendment. Davis v. Passman, 99 S. Ct. 2264 (1979).

"The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' *Meyer v. Nebraska*, 43 S. Ct. 625 (1889). Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977).

"The veterans' expectation of process was justifiable. This justifiable and objective expectation, like that held by the prisioners in *Vitek* and *Wolff*, rises to the level of a constitutionally protected liberty interest and requires appropriate process in the determination that the statutory criteria for transferring the veterans are met." United States v. Stead, 740 F.2d 657 (8th Cir.1984).

IV. ARGUMENT

Defendant's motion for summary judgment is based upon the following assertions:

1. Plaintiff seeks damages under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

2. This action is barred by the doctrine of res judicata.

3. Title VII of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment (citing Brown v. General Services Administration, 96 S. Ct. 1961 (1976)) and Plaintiff is therefore barred from initiating a cause of action under the Fifth Amendment to the United States Constitution.

THIS IS NOT A *BEVINS* ACTION AGAINST THE UNITED STATES GOVERNMENT:

At page two of the instant motion, Defendant paraphrases the complaint and acknowledges Defendant to be the United States Government as opposed to individual agents of the United States Government. Defendant then presents a series of arguments negating *Bevins* claims against the United States Government.

Liability rests with the United States Government/ Department of the Treasury in that the individual agents of the United States Government were acting within the scope of their authority. The following statement was presented within Plaintiff's motion to amend the initial complaint (Document No. 104 page 2) alleging violations of the Civil Rights Act of 1964 and is repeated at page nine of the complaint currently before this court:

> "Internal Revenue Service management persons (Prowler, Cox, Breslin, Clark, Rachael, Rodrigueq, etc.) did perform their assigned duties within the abusive management culture of the Internal Revenue Service which not only condoned; but also rewarded the threats, intimidation, harassment and retaliation which Plaintiff was subject to over a eight year period. Liability/responsibility for said abuse rests with the Defendant, not the individuals."

This is not a suit for damages directed to individual agents of the United States Government alleging violations of plaintiff's constitutional rights under color of federal authority. It is not the basis in this complaint that individual employees of the United States Government violated Plaintiff's constitutional rights by adverse personnel actions as specified in 5 CFR Ch. 1 Subpart D section 752.401(a) or engaged in prohibited personnel practices under Title 5, Chapter 23, section 2302 USC.

This is a suit for damages directed to the United States Government/Department of the Treasury alleging violation of Plaintiff's constitutional rights by **governmental actions** of the United States Government/Department of the Treasury. Larson, 69 S. Ct. at 1457. It is the basis in this complaint that Plaintiff, as a totally and permanently disabled veteran, has a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government. Plaintiff's constitutional rights are protected against said **governmental action** and it is proper that the courts have the power to grant relief against those actions. Larson, 69 S. Ct. at 1468.

THIS ACTION IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA:

The following statement was presented by Plaintiff at page two of the complaint of constitutional rights violations currently before this court:

"The Court did fail to address the specific allegations of Constitutional rights violations which **were presented as an amendment** to the above referenced Complaint of civil rights violations. 'We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today' Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in this Complaint under the 'constitutional standards' required by the United States Supreme Court in** *Washington v. Davis, supra.*"

The following statement was presented by Defendant at page six of the instant motion:

"Like the plaintiff in Ragsdale, Plaintiff should not be afforded a 'second bite at the apple' to assert now - afte rthe dismissal of his first case - tha this allegations of employment discrimination also violate the Fifth Amendment to the United States Constitution."

The decisions in Montana v. United States, 99 S. Ct. 970 (1979) and Ragsdale v. Rubbermaid , Inc., 193 F.3d 1235 (11th Cir. 1999) were based upon the premise, before any other considerations, that the relevant party has **"had a full and fair opportunity to litigate."** The facts and documentation as presented in this response to Defendant's motion for summary judgment clearly reflect the fact that Plaintiff **was**

denied the opportunity to litigate the alleged constitutional rights violation presented in the prior litigation.. The court did fail to take judicial notice of the motions to amend the initial civil rights complaint to include a claim of constitutional tort.

The court and the Defendant were advised of the claim of constitutional tort during the course of the preliminary injunction hearing (Document No. 32 pages 8, 9, 17), by motion to amend (Documents No. 97, 99, 104) which was properly and timely filed with the court three weeks before the court permitted Plaintiff to amend the initial complaint to bring action under the Rehabilitation Act of 1973 (Document No. 102, 106), and in Plaintiff's response to Defendant's motion for summary judgment (Document No. 107 pages 2 and 22).

The Order of the court granting Defendant's motion for summary judgment (Document No. 111 page 8) does address the amendment to the initial complaint to bring action under the Rehabilitation Act of 1973; however is silent as to the motion to amend for constitutional tort. The silence of the court is attributed to an administrative oversight for "outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules". Foman v. Davis, 83 S. Ct. at 224 (1962). Plaintiff did attempt to revive, at the appellate court level, the amendment to claim of constitutional tort; however the appellate court also failed to provide comment.

The United States Supreme Court did recognize in Washington v. Davis, 96 S. Ct. 2040 (1976) that the judicial standards applicable to equal employment opportunity cases should not be applied in resolving issues under the due process clause of the Fifth

Amendment. Washington v. Davis, supra. was decided six days after Brown v. General Services Administration, 96 S. Ct. 1961 (1976) indicating the Supreme Court had reviewed the judicial standards required in Title VII versus Fifth Amendment claims.

The court did rule in the prior litigation upon the motion to amend the initial complaint to bring action under the Rehabilitation Act of 1973 in that the determination was consistent with the decision in the alleged violation under Title VII (Document No. 111 page 4) (i.e. the judicial standards for review were compatible). A final decision on the motion to amend the initial complaint to include a claim of constitutional tort was not addressed by the court in that; although discovery was complete and the proposed amendment and the initial complaint did involve the same parties and the same nucleus of operative fact, a decision by the court would have required an analysis based upon judicial standards which differed from those presented in the Title VII and Rehab Act claims. The issues proposed by the amended claim of constitutional tort were legal and required no additional discovery to posture them for adjudication.

The question of constitutional tort was not litigated in the original action as required by United States v. Maser, 45 S. Ct. 66 (1924). The question of constitutional tort and a final judgment on the merits have not been determined by a court of competent jurisdiction as required by Southern Pacific R. Co. v. United States, 18 S. Ct. 18 (1897).

Defendant's motion is correct in that A) the initial complaint of civil rights violations, B) the motion to amend said initial complaint to include a claim of constitutional tort, and C) the complaint of constitutional tort before this court involve the same

parties and the same nucleus of operative fact; however the Defendant is incorrect in that no final judgment on the merits of the claim of constitutional rights violations has been rendered by a court of competent jurisdiction as required by Ragsdale, supra. The district court cannot, in the exercise of its discretion, treat as "final", that which is not "final" within the meaning of section 1291. Sears, Roebuck and Co. v. MacKey, 76 S. Ct. 895, 900 (1956).

As the United States Court of Appeals for the Eight Circuit did observe in Kelsey v. State of Minn., 565, F.2d 503 (1977); the amended complaint was not considered by the court and Plaintiff is free to file a new action alleging the claims of constitutional rights violations which were alleged in the amended complaint (Document No. 97, 99, 104) which was timely filed in the prior litigation.

PLAINTIFF IS NOT BARRED FROM INITIATING A CAUSE OF ACTION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Plaintiff believes this to be the single issue worthy of consideration by this court in the instant motion for summary judgment and that said issue is purely a question of law.

The composite of actions by the United States Government/Department of the Treasury were not **personnel actions** subject to remedy under section 717 Title VII of the Civil Rights Act of 1964. The act of retaliation in work assignments was recognized by Plaintiff as a personnel action and was the subject of a previous lawsuit under section 717(a) Title VII of the Civil Rights Act of 1964, as amended. Brown v. General Services Administation, 96 S. Ct. at 1966 (Document No 1).

The actions by the United States Government /Department of the Treasury are excepted from the judicial restrictions of section 717 via section 712 Title VII of the Civil Rights Act of 1964 in that said composite of actions, as described in the complaint currently before this court, were in violation of the constitutional rights of a totally and permanently disabled veteran.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. Brown v. General Services Administration, at 1964 (Citing Bolling v. Sharpe, 74 S. Ct. 695 (1954)). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Brown v. General Services Administration, 96 S. Ct. at 1968. Section 717 of Title VII leaves undisturbed whatever remedies plaintiff might otherwise possess. Davis v. Passman, 96 S. Ct. at 2278. As in the case of Brooks v. United States, 69 S. Ct. 918 (1949), it would be absurd to believe congress did not have the Constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964 and a reading of the entire Act reflects upon such an objective and policy. Plaintiff is therefore permitted to pursue his rights under both Title VII and any other law creating a special right as a totally and permanently disabled veteran.

The constitutional violations of Plaintiff's rights by the United States Government were invidious in nature and so unjustifiable as to be violative of due process under United States v. Gilman, 74 S. Ct. 695 (1954) and subject to challenge under Washington v. Davis, 96 S. Ct. 2040 (1996).

At page seven of the instant motion for summary judgment , Defendant provides the following statement:

> "In Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976), the Supreme Court held that Title VII of the Civil Rights Act of 1964 ' provides the exclusive judicial remedy for claims of discrimination in federal employment.'"

Defendant has incorrectly stated the conclusions by the Supreme Court in that the Court determined that **section 717** of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment. Brown v. General Services Administration, 96 S. Ct. at 1969. The distinction is very important in that **section 712** of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Services Administration, supra.

The exception to section 717 under section 712 of Title VII of the Civil Rights Act of 1964 will require an affirmative ruling by the court regarding the following legal questions:

1. Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. "Nothing contained in this title shall be construed to repeal or modify any *Federal*,

State, territorial, or local *law creating special rights* or preference *for veterans.*" Section 712 of the Civil Rights Act of 1964. Does recognition of the constitutional right referenced above provide a *special right* directed to totally and permanently disabled veterans in the employ of the United States Government ?

The following consideration are presented to the court in support of an affirmative response to the legal questions presented above.

Confirmation of Plaintiff's status as totally and permanently disabled veteran in correspondence from the Department of Veterans Affairs (Document No. 25 exhibit I).

"Mr. Starnes of Alabama. 'Mr. Speaker, from the very inception of our Republic our Government has extended certain special benefits and privileges to the men who have offered their lives in the defense of the country and its institutions. This is a sound principal.'" Congressional Record April 17, 1944 Veterans Preference in the Federal Civil Service.

The Federal Government, in its capacity as an employer, determined to take the lead in such a program. The Veterans' Preference Act was accordingly adopted, creating special preferences and protection for returning veterans at every stage of federal employment. Mitchell v. Cohen, 68 S. Ct. 518 (1948).

The first comprehensive federal veterans' statute was enacted in the Veterans' Preference Act of 1944, 58 Stat 387. The Federal Government has, however engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. Personnel Adm'r

of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The protection afforded the special rights and preferences for veterans under section 712 of Title VII of the Civil Rights Act of 1964 from constitutional challenge was recognized by the Supreme Court in Personnel Adm'r of Massachusetts v. Feeney, at 2286.

U.S.C. Title 5 sections 2108 and 3502 provide special considerations to disabled veterans upon entering and retaining employment with the Federal Government. U.S.C. Title 38 provides an extensive array of benefits available to disabled veterans including healthcare, education, housing assistance, clothing allowance, car allowance, compensation for service connected injuries, insurance, etc.

Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act , 38 U.S.C. section 4214, provides at (a)(1):

> "It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam Era."

Based upon the standards established by the United States Supreme Court in Washington v. Glucksberg 117 S. Ct. 2258, 2269 (1997), Plaintiff has a fundamental and constitutionally protected liberty interest which prohibits continuous **acts** of employment related threats of physical injury, discrimination and retaliation by the same **government** which put him in harms way in Vietnam.

The United States Government has violated the

constitutional rights of an American who became disabled in the service of his country. Plaintiff has a constitutional right to be free from and to obtain judicial relief for unjustified intrusions on personal security in the employ of the United States Government. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977). Based upon the federal employment benefits extended to disabled veterans by Congress, Plaintiff's expectation of process was justifiable and did rise to the level of a constitutionally protected liberty interest. United States v. Stead, 740 F.2d 657 (8th Cir. 1984).

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII may restrict a veterans constitutional rights and the courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

The section 717 restriction on remedy was **inferred** by the United States Supreme Court in *Brown v. General Service Administration*; however the language of section 712 of Title VII is **explicit**, **unambiguous** and **unchanged** since Congressional enactment.

Reliance by the defendant on *Brown v. General Service Administration*, is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 and the findings by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights.

Section 712 of Title VII of the Civil Rights Act of

1964 provides that Title VII is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of permanent and total disability. The fact said veteran is an employee of the United States Government should not deprive him of his constitutional rights.

Section 712 of Title VII was not referenced in *Brown v. General Service Administration* nor *Porter v. Adams* and therefore was not a fact in consideration by the respective courts.

V. CONCLUSION

This is a complaint of constitutional tort for **actions by the United States** Government which were egregious and continuous in nature. Said actions were the direct result of an abusive institutional environment which did promote, and failed to provide a venue for relief from said actions. "In passing on a motion to dismiss for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

Plaintiff takes strong exception to the following statement by Defendant at page four of the instant motion:

> "Specifically, in both actions, Plaintiff challenges the Department of Treasury's current organizational structure which, because he is unwilling to work under the supervision of Mr. Prowler, relegates Plaintiff to performing 'examinations below Plaintiff's working grade level,' rather than more challenging 'examinations of the largest and most complex entities.'"

The United States Government cannot create and actively condone a work environment in which a disabled veteran is threatened with physical harm on multiple occasions, harassed and retaliated against for reporting the threats, and then informed by the United States Government that because he was not physically injured he has no claim to relief. The facts in support of the unconstitutional governmental actions were well documented and supported by third-party testimony in the previous litigation.

The abuse of discretion in the denial of Plaintiff's right to a "full and fair opportunity to litigate" the alleged constitutional rights violation is symptomatic of the prior conduct of this court and subject to remedy by this court in the instant complaint.

Plaintiff believes the alleged constitutional rights violations are worthy of review by this court based upon consideration of the Supreme Court's decision in *Brown v. General Services Administration, supra*,. 96 S. Ct. at 1968. Based upon the facts specific to this complaint, there is an obvious conflict between the Supreme Courts **implied** judicial restrictions associated with actions under section 717 and the **explicit** exception provided under section 712 of Title VII of the Civil Rights Act of 1964, as amended.

WHEREFORE, Plaintiff respectfully requests that the court deny Defendant's motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure in that the moving party is not entitled to judgment as a matter of law.

Respectfully submitted under penalty of perjury this seventh day of November, 2000.

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Todd B. Grandy this seventh day of November, 2000 in accordance with Federal Rule of Civil Procedure 5.

"S/Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH,

Plaintiff,

Case No. 8:00CV1631-T-26E

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY, LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendants.

_____/

DOCUMENTS IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS PROVIDED UNDER COURT ORDER OF OCTOBER 17, 2000.

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00-16546-F

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY,
Secretary of the Treasury,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 00-1631 CV-T-26E)

BRIEF FOR APPELLANT

MELVIN E. BLOUGH
Pro Se - Appellant
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Brandon, FL 33511
(813) 651-3158

BLOUGH v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE TREASURY, Secretary of the Treasury

(11th Cir. - No. 00-16546-F)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Todd Bradshaw Grandy, Assistant United States Attorney, district court counsel for United States of America;

2. Melvin E. Blough, plaintiff-appellant, pro se;

3. Donna A. Bucella, United States Attorney;

4. The Honorable Richard A. Lazzara, United States District Judge;

5. Secretary of the Treasury, defendant-appellee.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the subject matter of this case in that appellant's claim arises under the Federal Constitution (28 U.S.C. section 1331) and represents an appeal of a final decision by the United States District Court for the Middle District of Florida Tampa Division (28 U.S.C. section 1291).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. When due process clause is invoked in novel context, court must begin inquiry with determination of precise nature of private interest that is threatened, and only after that interest has been identified, can court properly evaluate adequacy of process. Lehr v. Robertson, 103 S. Ct. 2985 (1983).

   "A necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of the **purely legal question** (emphasis added) permits courts expeditiously to weed out suits which fail the test." Siegert v.Gilley, 111 S. Ct. 1789, 1793 (1991).

   Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. "(Title VII) Section 717 of the Civil Rights Act of

1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. at 1969.

"Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*." Title VII Section 712 of the Civil Rights Act of 1964.

Does recognition of the constitutional right as stated in issue number one above; provide a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by the United States Supreme Court in *Brown v. General Services Administration* ?

3. The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. Reed v. Reed, 92 S. Ct 251, 254 (1971).

"Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of recognition of otherwise sound constitutional principles." Davis v. Passman, 99 S. Ct. 2264 (1979) (citing Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S. Ct. 1999 (1971)).

The United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit did not consider Appellant's (hereafter Blough) pleadings in the prior litigation and have applied the doctrine of res judicata to the current litigation. The actions of the respective Courts constitute an abuse of power in the denial of a full and fair opportunity to litigate a Complaint of Constitutional tort by the United States Government. The violation of Blough's Fifth Amendment right to procedural due process reflects disparate treatment and is unconstitutional.

STATEMENT OF THE CASE

The Fifth Amendment to the United States Constitution provides in part that "no person shall be ... deprived of life, liberty, or property, without due process of law ...." U.S. Const. amend V. It is clearly established that this clause provides both procedural and substantive due process protection from actions of the federal government.

This Complaint does encompass both substantive and procedural due process violations by the United States Government in the deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution:

(i) Course of proceedings and disposition in the court below:

Blough did initiate suit in district court alleging Fifth Amendment Constitutional Rights violations by Appellee (hereafter Government) (R1-1). The district court did grant Governments motion for summary

judgment based upon the doctrine of *res judicata* (RI-11).

(ii) Statement of the facts:

Status of Blough Providing for the Constitutionally Protect Liberty Interest Presented in Issues Number One and Two:

Blough is one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs (source: Department of Veterans Affairs FY 1998 Annual Report). Blough has two artificial legs and loss of use of one hand as a result of service in Vietnam (R1-10-25SR). The United States Government has since 1970 accepted full responsibility and liability for the aforementioned status of Blough.

Blough has been employed by the United States Government /Department of the Treasury since 1979 as an Internal Revenue Agent.

The Procedural-Due-Process Violation Presented as Issue Number Three:

The following allegation was presented in the Complaint of discrimination initially filed with the United States District Court for the Middle District of Florida Tampa Division on June 29, 1998 (R1-10-1SR):

> "The United States Government Department of the Treasury (Defendant/employer) has engaged in the unlawful and unconscionable employment practice of threatening physical injury to a disabled veteran (Plaintiff/employee) ...."

The initial Complaint is properly appended to include the following:

> The United States Government in the capacity of the United States District Court for the Middle District of Florida Tampa Division and the United States Court of Appeals for the Eleventh Circuit has engaged in the unlawful and unconscionable act of denying due process to a totally and permanently disabled veteran in a Complaint of Constitutional tort by the United States Government. The denial of due process was the direct result of disparate treatment by the respective Court's. The court record clearly reflects the fact that the Court's were predetermined to dispose of the Complaint are their earliest convenience and did not consider the pleadings as presented by Blough.

THE INITIAL CONPLAINT

The complaint as initially filed with the district court on June 29, 1998 did encompass a claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (R1-1SR). The initial complaint did also reference the physical disabilities of Blough, the threats of physical injury to Blough and the informal response/formal acceptance of said threats by the Government (Department of the Treasury and the Equal Employment Opportunity Commission).

A Claim of deprivation of a protected Fifth Amendment liberty interest by the Government was raised by Blough in response to the question of irreparable injury during the course of a preliminary injunction hearing (R1-10-32SR). The claim was supported in Blough's pleadings of February 16, 1999

with extensive documentation and third-party confirmation of the physical threats against Blough.

Blough did timely file motions to amend the initial complaint under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR), and a claim of constitutional tort against the United States Government (R1-10- 97SR, 99SR, 104SR).

The following statements were presented in Blough's motion for leave to amend the initial complaint (R1-10- 97SR) under rule 15(a):

> "Plaintiff has met the 'relation back' doctrine under 15(c)(2) of the Federal Rules of Civil Procedure in that the initial Complaint did reference the fear experienced by Plaintiff and threats, harassment and retaliation directed to Plaintiff by agents of Defendant since 1991.
>
> The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

A motion for summary judgment was taken under submission by the district court on September 10, 1999. Briefs and affidavits of the parties were to be filed by said date.

A) On September 10, 1999 the court was in possession of Blough's motion to amend the initial complaint, memorandum of law in support of motion to amend the complaint,

and the Government's motion in opposition to the motion to amend the complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR).

B) Prior to September 10, 1999 the court was in possession of Blough's motion to amend the initial complaint, memorandum of law in support of motion to amend the complaint, and the Government's motion in opposition to the motion to amend the complaint to include a claim of constitutional tort against the United States Government (R1-10-97SR, 99SR, 104SR).

The district court did concurrently grant Government's motion for summary judgment in the complaints of Civil Rights and Rehabilitation Act violations (R1-10-111SR); however did abuse its power in that the court did not consider Blough's pleadings in response to the Government's motion for summary judgment (R1-10-107SR) and Blough's motion to amend the initial complaint to include a claim of constitutional tort by the United States Government (R1-10-97SR, 99SR, 104SR). These conclusions are evident upon review of the Order of the district court (R1-10-111SR):

A) The following statement is presented within the initial paragraph of the Order of the district court(R1-10-111SR):

"This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107)."

The following statements were presented in

Blough's response to Government's motion for summary judgment (R1-10-107SR):

"Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint.

Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. **The facts are consistent with each route; however the law and remedies differ** (emphasis added).

1. Deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

2. Unlawful intentional discrimination which is prohibited under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

3. Unlawful intentional discrimination which is prohibited under the Rehabilitation Act of 1973, as amended."

Conclusion: The district court did not review Blough's pleadings (R1-10-107SR) in response to the Government's motion for summary judgment in that the Order of the district court (R1-10-111SR) does not reference the motion to amend for constitutional tort (R1-10-97SR, 99SR, 104SR) which was prominent in Blough's pleadings.

Review of the Order of the district court (R1-10-111SR) in conjunction with Blough's response to Government's motion for summary judgment (R1-10-107SR) provides further evidence that the district court did not review Blough's pleadings. The Order misrepresents the pleadings of both parties, creates an absurd scenario and then ridicules Blough for proposing said scenario.

B) The following statement is also presented within the initial paragraph of the Order of the district court (R1-10-111SR):

> "Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. 104 and 105."

Document 104 (R1-10-104SR) is a five page memorandum of law in support of Blough's motion the amend the initial complaint to include a claim of constitutional tort against the United States (R1-10-97SR) and was filed in response to the Government's motion in

opposition to Blough's motion to so amend (R1-10-99SR).

Document 105 is a three page motion and memorandum of law requesting a trial by jury. The following comments are noted within said motion:

> "Although the 5th amendment claim was at the heart of the initial complaint, it was a difficult issue for pro se Plaintiff to frame.
>
> The second motion to amend the initial complaint does contain an issue which is best addressed by a jury (i.e. deprivation of a fundamental and protected liberty interest which exists within the fifth amendment to the United States Constitution.
>
> Defendant was apprised of this 5th amendment challenge upon consideration of the facts presented in the initial complaint, the preliminary injunction hearing, and during the deposition of Plaintiff by Defendant."

Conclusion: The district court did not review either Document No. 104 or Document No. 105 in that the Order of the district court (R1-10-111SR) does not reference the motion to amend for constitutional tort which was prominent in both documents.

C) The following statement is also presented within the initial paragraph of the Order of the district court (R1-10-111SR):

> "Also before the Court is plaintiff's Motion to Amend Complaint (Doc. No. 33) and defendant's response in opposition (Doc. No. 36)."
>
> The Order was limited to the alleged violations under Title VII of the Civil Rights Act of 1964, as amended, (R1-10-1SR) and the motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR). The Order by the district court (R1-10-111SR) specifically states "Plaintiff's Motion to Amend Complaint (Doc. No. 33) is denied for the reasons set forth in this Order".

The district court did not rule in the prior litigation upon the merits of the instant complaint of constitutional tort (R1-1) which was properly filed in conjunction with the initial complaint (R1-10-1). This was an abuse of power in the denial of Blough's right to procedural due process.

The same parties are presented in this complaint of constitutional tort and A) the initial complaint alleging violations under Title VII of the Civil Rights Act of 1964, as amended, B) the motion to amend the initial complaint to include the Rehabilitation Act of 1973, and C) the motion to amend the initial complaint to include a claim of constitutional tort against the United State Government. This complaint of constitutional tort arose out of the same nucleus of conduct, transactions and occurrences set forth in A) the initial complaint of discrimination under Title VII of the Civil Rights Act of 1964, as amended, B) the motion to amend the initial complaint to include the Rehabilitation Act of 1973, and C) the motion to amend the initial complaint to include a claim of

constitutional tort against the United States Government.

THE INITIAL APPEAL

Blough did appeal the decision by the district court (R1-10-111SR) that the pending motions (R1-10-97SR, 99SR, 104SR) to amend the initial Complaint to include a claim of Constitutional deprivation of a fundamental and protected liberty interest by the United States Government were moot (United States Court of Appeals Eleventh Circuit Case No. 99-13735-FF). On May 9, 2000 the appellate court "rubber stamped" the decision of the district court and provided no comment relative to the pending motions to amend the initial complaint to include a claim of Constitutional tort (R1-10-Exhibit B SR). This was an abuse of power in the denial of Blough's right to procedural due process. The de novo standard of review was required relative to the Order of the district court (R1-10-111SR) denying all pending motions as moot.

THE CURRENT APPEAL

On August 8, 2000 Blough initiated suit in the United States District Court for the Middle District of Florida Tampa Division (R1-1) in the consistent and continuing allegation that "the United States of America did violate Plaintiff's Constitutional right as a totally and permanently disabled veteran to be secure in a fundamental and protected Fifth Amendment liberty interest. The violations did manifest as continuous acts of employment related threats of physical injury, harassment and retaliation over a nine year period."

The Complaint of August 8, 2000 (R1-1) includes the following reference to the prior litigation:

> "The Court did fail to address the specific allegations of Constitutional rights violations which were presented as an amendment to the above referenced Complaint of civil rights violations. 'We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.' Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in the Complaint under the 'constitutional standards' required by the United States Supreme Court in** *Washington v. Davis, supra.*"

The district court did grant Government's motion for summary judgment (R1-8) based upon the doctrine of *res judicata* (R1-11) and Blough has appealed said decision to this Court (R1-13). Blough's appeal is based upon the following statement by the trail judge in the dispositive Order (R1- 11) and reflects upon a continuing abuse of power by the Courts in the myopic view of the facts presented (R1-10) in Blough's asserted right to due process of law:

> "Moreover, as the Plaintiff has conceded, the claim he asserts in this case was always a part of the claim he asserted in the prior case. Even if it were not, it is manifestly clear from the record that the Plaintiff was well aware of the so-called constitutional tort claim based on the Fifth Amendment at the very inception of the earlier case and, therefore, **could easily have raised it in that case** (emphasis added)."

(iii) Standard of review:

Abuse of power by the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit is the correct standard of review. It is the judicial responsibility of the respective courts to review the pleadings of both parties prior to the rendering of a final decision. The failure of the respective courts to conduct said review of either parties pleadings and summarily disenfranchise a party to the litigation of their constitutionally guaranteed right to due process is a denial of due process.

Abuse of discretion is not the correct standard of review in that no decisions were rendered on the motion to amend the initial Complaint to include a deprivation of a protected liberty under the Fifth Amendment to the United States Constitution.

SUMMARY OF THE ARGUMENTS

1. The substantive due process violation did manifest as an abuse of power within the Executive Branch of the United States Government in the deprivation of the liberty interest presented as issue number one.

2. The procedural due process violation did manifest as an abuse of power within the Judicial Branch of the United States Government in the denial of a full and fair opportunity to litigate as presented in issue number three.

ARGUMENT AND CITATIONS OF AUTHORITY

<u>The Federal Question Presented as Issues Number One and Two:</u>

"It is argued that the principal of sovereign immunity is an archaic hang-over not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend." Larson v. Domestic & Foreign Commerce Corporation, 69 S. Ct. 1457 (1949) (citing Brooks v. United States, 69 S. Ct. 918).

"Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. Larson, 69 S. Ct. at 1468.

1. Protected liberty interest under the Fifth Amendment to the United States Constitution.

"Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society. Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932, 1937 (1977) (citing Griswold v. Connecticut, 85 S. Ct. at 1691).

"The right is fundamental 'because preservative of all rights.'" Harman v. Forssenius, 85 S. Ct. 1177, 1183 (1965) (citing Yick Wo v. Hopkins, 6 S. Ct. 1064).

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct

which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling v. Sharpe, 74 S. Ct. 693 (1954).

"Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' *id.*, 97 S. Ct. at 1938; *Snyder v. Massachusetts*, 54 S. Ct. 330 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty', such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut*, 58 S. Ct. 149 (1937). Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' Collins, 112 S. Ct. at 1068, that direct and restrain our exposition of the Due Process Clause. Washington v. Glucksberg, 117 S. Ct. 2258, 2269 (1997).

"Discrimination may be so unjustifiable as to be violative of due process." United States v. Gilman, 74 S. Ct. 695 (1954) (citing Detroit Bank v. United States, 63 S. Ct. 297; Currin v. Wallace, 59 S. Ct. 379; Steward Machine Co. v. Davis, 57 S. Ct. 883). "It is only invidious discrimination which offends the Constitution". Ferguson v. Skrupa, 372 U.S. 726 (1963).

The due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States government from invidious discrimination. Washington v. Davis, 96 S. Ct. 2040 (1976). Unconstitutional federal employment

discrimination was deemed actionable in the Federal Courts based upon a claim directed to the due process clause of the Fifth Amendment. Davis v. Passman, 99 S. Ct. 2264 (1979).

"The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against government power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' *Meyer v. Nebraska*, 43 S. Ct. 625 (1889). Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977).

"The veterans' expectation of process was justifiable. This justifiable and objective expectation, like that held by the prisioners in *Vitek* and *Wolff*, rises to the level of a constitutionally protected liberty interest and requires appropriate process in the determination that the statutory criteria for transferring the veterans are met." United States v. Stead, 740 F.2d 657 (8th Cir. 1984).

2. Section 717 of Title VII of the Civil Rights Act of 1964, as amended.

"The primary question in this litigation is not difficult to state: Is section 717 of the Civil Rights Act of 1964, as added by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. section 2000e-16 the exclusive individual remedy available to a federal employee complaining of job-

related discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe section 717's position in the constellation of antidiscrimination law. We must, therefor, infer congressional intent in less obvious ways." Brown v. General Services Administration, 96 S. Ct. 1961 (**Decided June 1, 1976).**

Federal employment discrimination clearly violated the Constitution before passage of the 1972 Act. Brown v. General Services Administration, 96 S. Ct. at 1964 (citing *Bolling v. Sharpe*, 74 S. Ct. 693 (1954).

"Section 717(a) provides that all **personnel actions** (emphasis added) affecting federal employees and applicants for federal employment 'shall be made free from any discrimination based on race, color, religion, sex, or national origin.'" Brown v. General Services Administration, 96 S. Ct. at 1966.

"The petitioner relies upon our decision in *Johnson v. Railway Express Agency*, 95 S. Ct. 1716 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon **the explicit legislative history of the 1964 Act which "' manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.'"** (emphasis added) 95 S. Ct. at 1719 quoting *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011, 1019-20. **There is no such legislative history behind the 1972 amendments.** (emphasis

added). Indeed, as indicated above, the congressional understanding was precisely to the contrary. Brown v. General Services Administration, 96 S. Ct. at 1968.

"In the case at bar, as in *Preiser* and the other cases cited above, the established principal leads unerringly to the conclusion that section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. at 1969.

"Because we conclude that section 717 bars reprisals against federal employees who file charges of discrimination, appellant must bring her action under that section." Porter v. Adams, 639 F.2d 273 (U.S.C.A 5th Cir. 3/13/81) (citing Brown v. GSA, 96 S. Ct. at 1969).

"Like the plaintiffs in *Bolling v. Sharp*, supra, petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. There is in this case 'no *explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." Davis v. Passman, 99 S. Ct. 2264, 2276, 2278 (1979) (citing Bivens v. Six Unknown Federal Narcotics Agents, 91 S. Ct. 1999 (1971)). **"On the contrary, section 717 leaves undisturbed whatever remedies petitioner might otherwise possess."** (emphasis added) Davis v. Passman, 96 S. Ct. at 2278.

3. Section 712 of Title VII of the Civil Rights Act of 1964.

"Nothing contained in this title shall be construed to repeal or modify any **Federal,** State, territorial, or local **law creating special rights** or

preference **for veterans**. (emphasis added). Public Law 88-352, July 2, 1964 ("Civil Rights Act of 1964").

Interpretation of the same words in different statutes may vary with the consequences, for such consequences may provide insight for determination of congressional purpose. "We brought the case here on certiorari because of its importance as an interpretation of the Act. It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." Brooks v. United States, 69 S. Ct. 918 (1949).

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibilities in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provision of the whole law, and to its object and policy." Richards v. United States, 82 S. Ct. 585, 591 (1962).

The following statements by Senator McCarthy appear in the Congressional Record June 19, 1964 in regard to the Civil Rights Act of 1964:

"The search for freedom and for a world in which freedom and equality can be enjoyed has been a preoccupation of civilized people throughout the history of the world. Certainly, it has been a preoccupation of Americans since this country was first settled. One man has said: once we have declared for liberty and for freedom and for equality, we have declared for an unending war in an unending revolution. Certainly, we in the United States have declared more often, more consistently and more loudly, for equality, for liberty and freedom; and consequently, we must bear the burden of that revolution and give the example.

These rights were claimed on the basis of the nature of man and the nature of a person. All of these rights to which we now refer today, on another occasion were declared to be the inalienable rights of all men. These civil rights do not derive because of law but, rather, derive from the very nature of man himself. They have their basis and they rest in that nature. We have made these basic human rights civil rights, and we have sought to guarantee and protect them through the Constitution of the United States and of the States, and through the laws of the land."

The equal employment provisions of the Civil Rights Act were designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. Alexander v. Gardner-Denver Co., 94 S. Ct. 1011 (1974). "Generally, a law will survive scrutiny under the equal protection clause if the distinction rationally furthers a legitimate state purpose." Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (citing Rubin v. United States, 101 S. Ct. 698,701 (1981).

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' Ginsberg & Sons v.

Popkin, 52 S. Ct. 322." Fourco Glass Co. v. Transmirra Products Corp., 77 S. Ct. 787, 791 (1957).

BLOUGH DOES HAVE A FUNDAMENTAL AND CONSTITUTIONALLY PROTECTED LIBERTY INTEREST WHICH PROHIBITS CONTINUOUS ACTS OF EMPLOYMENT RELATED THREATS OF PHYSICAL INJURY, DISCRIMINATION AND RETALIATION BY THE UNITED STATES GOVERNMENT AND IS NOT BARRED FROM INITIATING A CAUSE OF ACTION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Issues number one and two are purely questions of law and are essential to this complaint of substantive and procedural due process violations.

The composite of actions by the United States Government/Department of the Treasury were not **personnel actions** subject to remedy under section 717 Title VII of the Civil Rights Act of 1964. The act of retaliation in work assignments was recognized by Blough as a personnel action and was the subject of a previous lawsuit under section 717(a) Title VII of the Civil Rights Act of 1964, as amended. Brown v. General Services Administation, 96 S. Ct. at 1966 (Document No 1).

The **actions by the United States Government/ Department of the Treasury** are excepted from the judicial restrictions of section 717 via section 712 Title VII of the Civil Rights Act of 1964 in that said composite of actions, as described in the complaint currently before this court, were in violation of the constitutional rights of a totally and permanently disabled veteran.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. Brown v. General Services Administration, at 1964 (Citing Bolling v. Sharpe, 74 S. Ct. 695 (1954)). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Brown v. General Services Administration, 96 S. Ct. at 1968. Section 717 of Title VII leaves undisturbed whatever remedies Blough might otherwise possess. Davis v. Passman, 96 S. Ct. at 2278. As in the case of Brooks v. United States, 69 S. Ct. 918 (1949), it would be absurd to believe congress did not have the Constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964 and a reading of the entire Act reflects upon such an objective and policy. Blough is therefore permitted to pursue his rights under both Title VII and any other law creating a special right as a totally and permanently disabled veteran.

The constitutional violations of Blough's rights by the United States Government were invidious in nature and so unjustifiable as to be violative of due process under United States v. Gilman, 74 S. Ct. 695 (1954) and subject to challenge under Washington v. Davis, 96 S. Ct. 2040 (1996).

At page seven of the instant motion for summary judgment, Government provides the following statement:

"In Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976), the Supreme Court held that Title VII of the Civil Rights Act of 1964 ' provides the exclusive judicial remedy for claims of discrimination in federal employment.'" The Government did also claim this

exception in Government's motion in opposition to Blough's motion to amend the initial complaint to include a claim of Constitutional tort (R1-10-97SR).

Government has incorrectly stated the conclusions by the Supreme Court in that the Court determined that **section 717** of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment. Brown v. General Services Administration, 96 S. Ct. at 1969. The distinction is very important in that **section 712** of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Services Administration, supra.

The exception to section 717 under section 712 of Title VII of the Civil Rights Act of 1964 will require an affirmative ruling by the court regarding the following legal questions:

1. Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. "Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans.*" Section 712 of the Civil Rights Act of 1964. Does recognition of the constitutional right referenced above provide a *special right* directed to totally and permanently disabled veterans in the employ of the United States Government ?

The following consideration are presented to the court in support of an affirmative response to the legal questions presented above.

Confirmation of Blough's status as totally and permanently disabled veteran in correspondence from the Department of Veterans Affairs (R1-10-25SR).

The Federal Government, in its capacity as an employer, determined to take the lead in such a program. The Veterans' Preference Act was accordingly adopted, creating special preferences and protection for returning veterans at every stage of federal employment. Mitchell v. Cohen, 68 S. Ct. 518 (1948).

The first comprehensive federal veterans' statute was enacted in the Veterans' Preference Act of 1944, 58 Stat 387. The Federal Government has, however engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The protection afforded the special rights and preferences for veterans under section 712 of Title VII of the Civil Rights Act of 1964 from constitutional challenge was recognized by the Supreme Court in Personnel Adm'r of Massachusetts v. Feeney, at 2286.

U.S.C. Title 5 sections 2108 and 3502 provide special considerations to disabled veterans upon entering and retaining employment with the Federal Government. U.S.C. Title 38 provides an extensive array of benefits available to disabled veterans including healthcare, education, housing assistance, clothing allowance, car allowance,

compensation for service connected injuries, insurance, etc.

Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act , 38 U.S.C. section 4214, provides at (a)(1):

"It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam Era."

Based upon the standards established by the United States Supreme Court in Washington v. Glucksberg 117 S. Ct. 2258, 2269 (1997), Blough has a fundamental and constitutionally protected liberty interest which prohibits continuous **acts** of employment related threats of physical injury, discrimination and retaliation by the same **government** which put him in harms way in Vietnam.

The United States Government has violated the constitutional rights of an American who became disabled in the service of his country. Blough has a constitutional right to be free from and to obtain judicial relief for unjustified intrusions on personal security in the employ of the United States Government. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977). Based upon the federal employment benefits extended to disabled veterans by Congress, Blough's expectation of process was justifiable and did rise to the level of a constitutionally protected liberty interest. United States v. Stead, 740 F.2d 657 (8th Cir. 1984).

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII may restrict a veterans constitutional rights and the courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

The section 717 restriction on remedy was **inferred** by the United States Supreme Court in *Brown v. General Service Administration*; however the language of section 712 of Title VII is **explicit**, **unambiguous** and **unchanged** since Congressional enactment.

Reliance by the Government on *Brown v. General Service Administration*, is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 and the findings by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights.

Section 712 of Title VII of the Civil Rights Act of 1964 provides that Title VII is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of permanent and total disability. The fact said veteran is an employee of the United States Government should not deprive him of his constitutional rights.

Section 712 of Title VII was not referenced in *Brown v. General Service Administration* nor *Porter v. Adams* and therefore was not a fact in consideration by the respective courts.

The Procedural-Due-Process Violation Presented as Issue Number Three:

"Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner." Boddie v. Connecticut, 91 S. Ct. , 780, 784 (1971).

"It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system." Boddie, supra at 784.

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. What the Constitution does require is 'an *opportunity* * * * granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo, 85 S. Ct. 1187 (1965),* 'for [a] hearing appropriate to the nature of the case. In short, ' within the limits of practicability,' a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. Boddie, supra at 786 (citing Mullane v. Central Hanover Bank & Trust Co, 70 S. Ct. 652, 657 (1950).

"In our judgment, the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied

the respondent a hearing. It is alleged that he was in the position of an alien enemy and hence could have no locus standi in that forum. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice." McVeigh v. U.S., 11 Wall. 259, 267.

"The principal, stated in this terse language, lies at the foundation of all well-ordered systems of jurisprudence. Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is the principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." Windsor v. McVeigh, 93 U.S. 277, 278.

"Not only does the word 'deprive' in the Due Process Clause connote more that a negligent act, but we should not 'open the federal courts to lawsuits where there has no affirmative abuse of power'. Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, it services to prevent governmental power from being used for purposes of oppression. More important, the difference between one end of the spectrum -

negligence - an dthe other - intent- is abundantly clear." Daniels v. Williams, 106 S. Ct. 662, 665 (1986) (citing Parratt v. Taylor, 101 S. Ct. 1908 (1981)).

"The hearing, moreover, must be a real one, not a sham or a pretense. Palko v. State of Connecticut, 302 U.S. 319 (1937) (citing Moore v.Dempsey, 43 S. Ct. 265 and Mooney v. Holohan, 55 S. Ct. 340).

"Due Process Claim. The government may not deprive any person of 'life, liberty or property without due process of law'. U.S. Const. amend. To prevail upon its procedural due process claim, BJC must establish: (1) a constitutionally protected interest in life, liberty or property; (2) **government deprivation of that interest** ; and (3) **the constitutional inadequacy of procedures accompanying the deprivation** (emphasis added)." Bank of Jackson County v. Cherry, 980 F.2d 1362 (11th Cir. 1993) (citing Lehr v. Robertson, 103 S. Ct. 2985, 2990 (1983)).

"Judgment on the merits is conclusive, and bars subsequent action between same parties on the same question, claim, or demand, and also concludes parties on different claim or demand which involves same question as litigated in original action." United States v. Moser, 45 S. Ct. 66 (1924).

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ....' *Souther Pacific R. Co. v. United States*, 18 S. Ct. (1897). Under res judicata, a final judgment on the merits bars further claims by the parties or their privies based on the same cause of

action. *Cromwell v. County of Sac*, 94 U.S. 351 (1877). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra*, at 27. **To preclude parties from contesting matters that they have had a full and fair opportunity to litigate** (emphasis added) protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. U.S., 99 S. Ct. 970 (1979).

"**The purpose behind the doctrine of res judicata is that the 'full and fair opportunity to litigate** (emphasis added) protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial actions by minimizing the possibility of inconsistent decisions.' Ragsdale v. Rubbermaid., 193 F.3d 1235, 1238 (11th Cir. 1999) (quoting Montana, supra). Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding. *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir. 1990).

"Under Eleventh Circuit precedent, a claim will be barred by prior litigation if all four of the following elements are present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." Ragsdale, supra at 1238.

"In the Eleventh Circuit, '[t]he principal test for determining whether the causes of action are the same is whether the primary right and duty are the

same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form'. 'It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as the former action, that the two cases are really the same 'claim or cause of action' for purposes of res judicata". Ragsdale, 193 F.3d at 1239 (quoting Citibank, supra).

"We must [therefore] look to the factual issues to be resolved [in Rubbermaid II], and compare them with the issues explored in Rubbermaid I. *Id.* Did they arise out of the same transaction or series of transactions ? Could Miller have brought his retaliation claim when he brought his *qui tam* claim ?" Ragsdale, 193 F3d. at 1239.

The Supreme Court, Mr. Justice White, held that standards applicable to equal employment opportunity cases should not have been applied in resolving issue whether the test violated due process clause of the Fifth Amendment. Washington v. Davis, 96 S. Ct. 2040 (**Decided June 7, 1976).**

Allegations of assault and battery and use of excessive force are sufficient to state a constitutional violation when such actions were severe.
See, e.g., Jones v. Hildebrant, 97 S. Ct. 2283, 2287 (1997).

The thrust of Rule 15 of the Federal Rules of Civil Procedure is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings. Conley v. Gibson, 78 S. Ct. 99, 103 (1957).

"We are of the opinion that the amendment was properly permitted. Rule 15(c) of the Federal Rules of

Civil Procedure .... provides that "Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleadings." Tiller v. Atlantic Coast Line R. Co., 65 S. Ct. 421, 424 (1945). "The grant or denial of an opportunity to amend pleadings pursuant to Federal Civil Procedure Rule 15(a) is within the discretion of the Federal District Court, but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules."Foman v. Davis, 83 S. Ct. at 224 (1962).

"In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. " Murphy v. Hunt, 102 S. Ct. at 1183 (1982) (United States Parole Comm'n v. Geraghty, 100 S. Ct. at 1208 (1980)). "The District Court *cannot*, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of section 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. Sears, Roebuck and Co. v. Mackey, 76 S. Ct. 895, 900 (1956).

THE ACTIONS OF THE RESPECTIVE COURTS CONSTITUTE AN ABUSE OF POWER IN THE DENIAL OF A FULL AND FAIR OPPORTUNITY TO LITIGATE A COMPLAINT OF CONSTITUTIONAL TORT BY THE UNITED STATES GOVERNMENT. THE VIOLATION OF BLOUGH'S FIFTH AMENDMENT RIGHT TO PROCEDURAL DUE PROCESS REFLECTS DISPARATE TREATMENT

BASED UPON PRO SE STATUS AND IS UNCONSTITUTIONAL.

"A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 34 S. Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only-that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted. Armstrong v. Manzo, 85 S. Ct. 1187, 1191 (1965).

The following statement was presented by Blough at page two of the complaint of constitutional rights violations currently before this court(R1-1):

The Court did fail to address the specific allegations of Constitutional rights violations which **were presented as an amendment** to the above referenced Complaint of civil rights violations. "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in this Complaint under the 'constitutional standards' required by the United States Supreme Court in** *Washington v. Davis, supra.*

The decisions in Montana v. United States, 99 S. Ct. 970 (1979) and Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999) were based upon the premise, **before any other considerations**, that the relevant party has **"had a full and fair opportunity to**

litigate". The facts and documentation as presented in the response to Government's motion for summary judgment clearly reflect the fact that Blough **was denied** the opportunity to litigate the constitutional rights violations presented in the prior litigation. The Courts did not consider the motions to amend the initial civil rights complaint to include a claim of constitutional tort.

The court and the Government were advised of the claim of constitutional tort during the course of the preliminary injunction hearing (R1-10-32SR), by motion to amend (R1-10-97SR, 99SR, 104SR) which was properly and timely filed with the court three weeks before the court permitted Blough to amend the initial complaint to bring action under the Rehabilitation Act of 1973 (R1-10-102SR, 106SR), and in Blough's response to Government's motion for summary judgment (R1-10-107SR).

The Order of the court granting Government's motion for summary judgment (R1-10-111SR) does address the amendment to the initial complaint to bring action under the Rehabilitation Act of 1973; however is silent as to the motion to amend for constitutional tort. Blough did attempt to revive, at the appellate court level, the amendment to claim of constitutional tort; however the appellate court also failed to provide comment.

The United States Supreme Court did recognize in Washington v. Davis, 96 S. Ct. 2040 (1976) that the judicial standards applicable to equal employment opportunity cases should not be applied in resolving issues under the due process clause of the Fifth Amendment. Washington v. Davis, supra. was decided six days after Brown v. General Services Administration, 96 S. Ct. 1961 (1976) indicating that the Supreme Court had reviewed the judicial

standards required in Title VII versus Fifth Amendment claims.

The court did rule in the prior litigation upon the motion to amend the initial complaint to bring action under the Rehabilitation Act of 1973 in that the determination was consistent with the decision in the alleged violation under Title VII (R1-10-111SR) (i.e. the judicial standards for review were compatible). A final decision on the motion to amend the initial complaint to include a claim of constitutional tort was not addressed by the court in that; although discovery was complete and the proposed amendment and the initial complaint did involve the same parties and the same nucleus of operative fact, a decision by the court would have required an analysis based upon judicial standards which differed from those presented in the Title VII and Rehab Act claims. The issues proposed by the amended claim of constitutional tort were legal and required no additional discovery to posture them for adjudication.

Blough was denied the opportunity to be heard on the claim of constitutional tort in the initial litigation as required by the due process clause of the Fifth Amendment, United States v. Moser, 45, S. Ct. 66 (1924), and Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999). The question of constitutional tort and a final judgment on the merits have not been determined by a court of competent jurisdiction as required by Southern Pacific R. Co. v. United States, 18 S. Ct. 18 (1897).

Government's motion for summary judgment is correct in that A) the initial complaint of civil rights violations, B) the motion to amend said initial complaint to include a claim of constitutional tort, and C) the complaint of constitutional tort before this court involve the same parties and the same nucleus

of operative fact; however the Government is incorrect in that no final judgment on the merits of the claim of constitutional rights violations has been rendered by a court of competent jurisdiction as required by Ragsdale, supra. The district court cannot treat as "final", that which is not "final" within the meaning of section 1291. Sears, Roebusk and Co. v. MacKey, 76 S. Ct. 895, 900 (1956).

As the United States Court of Appeals for the Eight Circuit did observe in Kelsey v. State of Minn., 565, F.2d 503 (1977); the amended complaint was not considered by the court and Blough is free to file a new action alleging the claims of constitutional rights violations which were alleged in the amended complaint (R1-10-97SR, 99SR, 104SR) which were timely filed in the prior litigation.

CONCLUSION

In *McKinney v. Missouri-Kansas-Texas Railroad Co.* a veteran did assert "special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces" and the United States Supreme Court did grant certiorari "because of the importance of the question presented in the administration of the statute and the protection of veterans rights thereunder". McKinney v. Missouri-Kansas-Texas Railroad Co., 78 S. Ct. 1222, 1225 (1958).

It is suggested to the court that the legitimate governmental objective procedurally denied by the respective courts in issue number three is the private interest in a federal special right for totally and permanently disabled veterans denied by the United States Government in issues number one and two.

This is a complaint of constitutional tort for **actions by the United States Government** which were egregious and continuous in nature. Said actions were the direct result of an abusive institutional environment which did promote, and failed to provide a venue for relief from said actions.

The United States Government cannot create and actively condone a work environment in which a disabled veteran is threatened with physical harm on multiple occasions, harassed and retaliated against for reporting the threats, and then informed by the United States Government that because he was not physically injured he has no claim to relief. The facts in support of the unconstitutional governmental actions were well documented and supported by third-party testimony in the previous litigation.

Blough believes the alleged constitutional rights violations are worthy of review by the United States Supreme Court based upon consideration of the Supreme Court's decision in *Brown v. General Services Administration, supra,*. 96 S. Ct. at 1968. Based upon the facts specific to this complaint, there is an obvious conflict between the Supreme Courts **implied** judicial restrictions associated with actions under section 717 and the **explicit** exception provided under section 712 of Title VII of the Civil Rights Act of 1964, as amended.

The record clearly indicates that Blough did raise the claim of Constitutional tort based on the Fifth Amendment in the prior litigation (R1-10-1SR, 32SR, 97SR, 99SR, 104SR) . The purpose in Rule 15(a) of the Federal Rules of Civil Procedure is to afford the injured party the full and fair opportunity to be heard. The abuse of power by the United States District Court for the Middle District of Florida Tampa Division

and the United States Court of Appeals for the Eleventh Circuit in the denial of Blough's right to a "full and fair opportunity to litigate" the alleged constitutional rights violations is subject to remedy in the current litigation.

WHEREFORE, Blough respectfully requests that the court defer to the United States Supreme Court to resolve the issues presented in that they reflect questions of law which are of national significance in addressing the constitutional rights of totally and permanently disabled veterans in the employ of the United States Government.

Respectfully submitted under penalty of perjury this twenty-third day of January, 2001.

"S/Melvin E. Blough" pro se

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CERTIFICATE OF TYPE SIZE AND STYLE

Appellant certifies that 14 point Times New Roman font is used in this brief.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Appellant certifies that this brief contains (limit 11,286) words.

CERTIFICATE OF SERVICE

I hereby certified under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Todd Bradshaw Grandy this twenty-third day of January, 2001.

"S/Melvin E. Blough" pro se

RECORD EXCERPTS

TO THE BRIEF FOR APPELLANT

00-16546-F

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY,
Secretary of the Treasury,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 00-1631 CV-T-26E)

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*Document numbers correspond to district court docket sheet in complaint of constitutional tort currently upon appeal to this court.

**Document numbers correspond to district court docket sheet number in initial claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended.

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**Document numbers correspond to district court docket sheet number in initial claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended.

**Copies of the documents listed above (with the exception of Doc. No. 105) were initially included within item number ten of the case currently on appeal to this court. Blough has secured and

provided certified copies of these specific documents which were not available at time of Blough's response to motion for summary judgment.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Todd Bradshaw Grandy this twenty-third day of January, 2001.

"S/Melvin E. Blough" pro se

00-16546-F

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE TREASURY, PAUL H. O'NEILL, Secretary of the Treasury,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 00-1631 CV-T-26E)

REPLY BRIEF FOR APPELLANT

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ARGUMENTS AND CITATIONS OF AUTHORITY

ISSUE NUMBER ONE OF APPELLANT'S BRIEF

Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

Appellee's (hereafter Government) brief is silent as to issue number one. This is consistent with the non-response to this issue by the Government, the district court and the appellate court in the current and prior litigation R1-8/ R1-10-32SR page 17, 99SR, 111SR, Ex. B SR/ R1-11) This issue was initially presented by Appellant (hereafter Blough) in the course of a district court hearing (R1-10-32SR page 17) in the prior litigation, in the motion to amend the complaint in the initial litigation (R1-10-97SR), in the brief/reply brief/petition for rehearing en banc of the appeal in the initial litigation (Exhibit C record excerpts), in the complaint as filed in the current litigation (R1-1 page 4), and in response to Government's motion for summary judgment in both the prior and current litigation (R1-10-107SR page 22 and R1-10 page 14).

The silence of the Government and the respective courts is attributed to the conclusion that Blough's claim of constitutional tort, as stated above, is merged into the Title VII claim under the rationale of Brown v. General Services Administration, 96 S. Ct. 1961 (1976) and the following judicial instruction by the United States Supreme Court:

> "It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons, will

> inquire first into the statutory question. This practice reflects the deeply rooted doctrine 'that we ought not to pass on questions of constitutionally ..... unless such adjudication is unavoidable.'" Harris v. McRae, 100 S. Ct. 2671, 2683 (1980) (citing Spector Motor Service,Inc. v. McLaughlin, 65 S. Ct. 152.

Blough suggests to the court that the analytical structure under which this claim of constitutional tort should be addressed is most accurately presented in *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991) as opposed to *Harris v. McRae*, supra, in that the adjudication of the constitutional right asserted is determinative of the **special right** of exception under the statute (Title VII section 712 of the Civil Rights Act of 1964) presented as issue number two and the proper evaluation of the adequacy of due process as presented as issue number three in that "what process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made." Parham v. J.R., 99 S. Ct. 2493, 2507 (1979).

The failure of the Government and the courts to address the claim of constitutional tort based upon the judicial instruction of *Harris v. McRae*, supra, and Supreme Court's decision in *Brown v. General Services Administration*, supra, goes beyond "putting the cart before the horse" and in fact removes the horse from the cart. As discussed below at issue number two; the statutory exclusion provision of section 712 of Title VII of the Civil Rights Act of 1964, as amended, is compatible with the restrictions of section 717 of said Act. It is the blanket **exclusive remedy** of section 717 of the Act as **inferred** by the United States Supreme Court in *Brown v. General Services Administration*, supra, which is challenged based upon facts specific to this case. The asserted constitutional right must be recognized to fairly challenge as a

s**pecial constitutional right** under Title VII section 712 of the Civil Rights Act of 1964, as amended, providing exception to the Supreme Courts inferred restriction in *Brown v. General Services Administration*, supra. This is a case of first impression in that the exception of section 712 Title VII of the Civil Rights Act of 1964 has never been litigated.

ISSUE NUMBER TWO OF APPELLANT' BRIEF

Does recognition of the constitutional right as stated in issue number one above; provide a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by the United States Supreme Court in *Brown v. General Services Administration* ?

Government's response is limited to the statement that "nothing in section 712, itself, however creates additional special rights or preference for veterans".

Blough disputes the Government's response upon consideration of the following analysis of historical and legal exceptions which are based upon specific constitutional obligations of the United States Government:

The purpose of Congress is a dominant factor in determining meaning of a statute. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion. United States v. Congress of Industrial Organizations, 68 S. Ct. 1349, 1352 (1948).

The following statement was presented within the closing address by the Speaker of the House of Representatives on March 3, 1865 and reported in The Congressional Globe. On said date the respective House did pass Resolution No. 27 to encourage preferential employment of disabled and discharged soldiers:

> "May I not remind you that the widow and the fatherless, the maimed and the wounded, the diseased and the suffering, whose anguish springs from this great contest, **have claims on all of us** (emphasis added), heightened immeasurably by the sacred cause for which they have given so much" ?

The first comprehensive federal veterans' statute was enacted in the Veterans' Preference Act of 1944, 58 Stat 387. The Federal Government has, however engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The protection afforded the special rights and preferences for veterans under section 712 of Title VII of the Civil Rights Act of 1964 from constitutional challenge was recognized by the Supreme Court in Personnel Adm'r of Massachusetts v. Feeney, at 2286.

The following statement by Representative Starnes appears in the Congressional Record of April 17, 1944 in regard to the Veterans' Preference Act of 1944:

> "From the very inception of our Republic our Government has extended certain special benefits and privileges to the men who have offered their lives in defense of the country and its institutions. This is a sound principle."

Public Law 78-359

"Veterans' Preference Act of 1944"

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and **this Act shall not be construed to take away from the preference eligible any rights** heretofore granted to, or **possessed by**, **him under any existing law**, Executive order, civil-service rule or regulation, **of any department of the Government** or officer thereof (emphasis added).

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibilities in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provision of the whole law, and to its object and policy." Richards v. United States, 82 S. Ct. 585, 591 (1962).

The following statement by Senator McCarthy appears in the Congressional Record of June 19, 1964 in regard to the Civil Rights Act of 1964:

> "The moral basis of these civil rights and of this pending civil rights bill is expressed most clearly in the Declaration of Independence and in the Constitution and affirmatively included in the moral and religious principles which the great majority of the citizens of the United States have accepted and do accept."

Public Law 88-352

"Civil Rights Act of 1964"

TITLE VII---EQUAL EMPLOYMENT OPPORTUNITY

DISCRIMINATION BECAUSE OF .....NATIONAL ORIGIN

Sec. 703 (i). Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

VETERANS' PREFERENCE

Sec. 712. **Nothing contained in this title shall be construed to repeal or modify any Federal**, State, territorial, or local **law creating special rights or preference for veterans (**emphasis added).

In extending the general anti-discrimination machinery to federal employment with the 1972 addition of section 717 to the Civil Rights Act of 1964 , Congress in no way modified the public employment preferences within the Bureau of Indian Affairs (agency of the Federal Government), as provided by the Indian Reorganization Act of 1934, which were built into the 1964 Civil Rights Act. Morton v. Mancari, 94 S. Ct. 2474, 2481 (1974).

In extending the general anti-discrimination machinery to federal employment with the 1972 addition of section 717 to the Civil Rights Act of 1964 , Congress in no way modified the public employment preferences within the Federal Government as provided by the Veterans Preference Act of 1944,

which were built into the 1964 Civil Rights Act under section 712.

The federal policy of according hiring preference to Indians is a longstanding policy dating back to 1834 and an important component of the Government's Indian program. The anti-discrimination provision of Title VII of the 1964 Civil Rights Act, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different problem. Morton, supra, at 2482.

Title VII was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth Amendment. United Steelworkers, Etc. v. Weber, 99 S. Ct. 2721, 2729 (1979).

The federal policy of according hiring preference to disabled veterans is a longstanding policy dating back to 1865 and an important component of the Government's program directed to disabled veterans. The anti-discrimination provision of Title VII of the 1964 Civil Rights Act, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different problem.

Three months after Congress passed the 1972 amendments to the Civil Rights Act of 1964, it enacted two *new* Indian preference laws. The intention of the legislature to repeal "must be clear and manifest". *United States v. Borden Co.*, 60 S. Ct. 182, 188 (1939). In light of the factors indicating no repeal, the Supreme Court did not conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments. Morton, supra, at 2483.

In the same year that Congress passed the 1972 amendments to the Civil Rights Act of 1964, it enacted The Vietnam Era Veterans' Readjustment Assistance Act (Public Law 92-540) "promoting the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam Era." In light of the factors indicating no repeal, it is obvious that Congress did not abandon its policy of furthering the interests of disabled veterans when it passed the 1972 amendments to the Civil Rights Act of 1964.

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' Ginsberg & Sons v. Popkin, 52 S. Ct. 322." Fourco Glass Co. v. Transmirra Products Corp., 77 S. Ct. 787, 791 (1957).

The Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Bulova Watch Co. v. United States*, 81 S. Ct. 864 (1961). Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. Morton, supra, at 2483.

The Federal preference statute under section 712 Title VII of the Civil Rights Act of 1964 is based upon the Veterans' Preference Act of 1944. Preferences are clearly defined; however the **rights** of veterans are not defined; although provided for in both Acts. Section 717 Title VII of the 1964 Civil Rights Act, as amended, is of general application. Here, the **rights** and

preferences provided to veterans by Congress are reasonably and directly related to a legitimate, nondiscriminatory obligation of the United States Government. As with the American Indians; said obligation to totally and permanently disabled veterans is of constitutional stature.

"Generally, a law will survive scrutiny under the equal protection clause if the distinction rationally furthers a legitimate state purpose." Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution under Article I, section 8, clause 3. If every piece of legislation providing special treatment for tribal Indians were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments (preferential treatment under the Civil Rights Act of 1964) will not be disturbed. Morton, supra, at 2485.

Generally, statutory classifications are valid if they bear a rational relationship to a legitimate governmental purpose. Statutes are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right ..... . Regan v. Taxation With Representation of Washington, 103 S. Ct. 1997, 2001 (1983).

"It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless 'the

classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.' McGowan v. State of Maryland, 81 S. Ct. 1101, 1105 (1961).

The plenary power of Congress to protect the totally and permanently disabled veterans is drawn implicitly from the inherent fundamental liberty interest of said veterans under the Fifth Amendment to the Constitution. It would be irrational to believe that Congress passed legislation in 1972 (i.e. section 717 of Title VII of the Civil Rights Act of 1964) which permitted the United States Government to violate the constitutional rights of totally and permanently disabled veterans in the employ of the United States Government.

Section 717 of Title VII of the Civil Rights Act of 1964, as amended, is not unconstitutional in that Congress did provide protection to the fundamental constitutional rights of totally and permanently disabled veterans via section 712 of the respective Act. If every piece of legislation providing special treatment for disabled veterans were deemed invidious racial discrimination, a portion of one Title of the United States Code (5 U.S.C.) and an entire Title of the United States Code (38 U.S.C.) would be effectively erased and the solemn commitment of the Government towards veterans would be jeopardized. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique constitutional obligation toward veterans, such legislative judgments (preferential treatment under the Civil Rights Act of 1964) will not be disturbed.

"The primary question in this litigation is not difficult to state: Is section 717 of the Civil Rights Act of 1964, as added by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C.

section 2000e-16 the exclusive individual remedy available to a federal employee complaining of job-related discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe section 717's position in the constellation of antidiscrimination law. We must, therefor, infer congressional intent in less obvious ways." Brown v. General Services Administration, 96 S. Ct. 1961 (1976).

"Section 717(a) provides that all personnel actions affecting federal employees and applicants for federal employment 'shall be made free from any discrimination based on race, color, religion, sex, or national origin.'" Brown v. General Services Administration, 96 S. Ct. at 1966.

"The petitioner relies upon our decision in *Johnson v. Railway Express Agency*, 95 S. Ct. 1716 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon the explicit legislative history of the 1964 Act which 'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.'" 95 S. Ct. at 1719 quoting *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011, 1019-20. There is no such legislative history behind the 1972 amendments. Indeed, as indicated above, the congressional understanding was precisely to the contrary. Brown v. General Services Administration, 96 S. Ct. at 1968.

"In the case at bar, as in *Preiser* and the other cases cited above, the established principal leads unerringly to the conclusion that section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. at 1969.

"Because we conclude that section 717 bars reprisals against federal employees who file charges of discrimination, appellant must bring her action under that section." Porter v. Adams, 639 F.2d 273 (U.S.C.A 5th Cir. 3/13/81) (citing Brown v. GSA, 96 S. Ct. at 1969).

"Like the plaintiffs in *Bolling v. Sharp*, supra, petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. There is in this case 'no *explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." Davis v. Passman, 99 S. Ct. 2264, 2276, 2278 (1979) (citing Bivens v. Six Unknown Federal Narcotics Agents, 91 S. Ct. 1999 (1971)). "On the contrary, section 717 leaves undisturbed whatever remedies petitioner might otherwise possess." Davis v. Passman, 96 S. Ct. at 2278.

Section 712 of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Services Administration, supra. The exception will require an affirmative ruling by the court regarding issue number one and issue number two as presented.

Based upon the standards established by the United States Supreme Court in Washington v. Glucksberg 117 S. Ct. 2258, 2269 (1997), Blough has a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the same government which put him in harms way in Vietnam.

The actions by the United States Government/ Department of the Treasury are excepted from the judicial restrictions of section 717 via section 712 Title VII of the Civil Rights Act of 1964 in that said composite of actions, as described in the complaint currently before this court, were in violation of the constitutional rights of a totally and permanently disabled veteran.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. Brown v. General Services Administration, at 1964 (Citing Bolling v. Sharpe, 74 S. Ct. 695 (1954)). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Brown v. General Services Administration, 96 S. Ct. at 1968. Section 717 of Title VII leaves undisturbed whatever remedies Blough might otherwise possess. Davis v. Passman, 96 S. Ct. at 2278. As in the case of Brooks v. United States, 69 S. Ct. 918 (1949), it would be absurd to believe congress did not have the Constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964 and a reading of the entire Act reflects upon such an objective and policy. Blough is therefore permitted to pursue his rights under both Title VII

and any other law creating a special right as a totally and permanently disabled veteran.

The constitutional violations of Blough's rights by the United States Government were invidious in nature and so unjustifiable as to be violative of due process under United States v. Gilman, 74 S. Ct. 695 (1954) and subject to challenge under Washington v. Davis, 96 S. Ct. 2040 (1996).

The United States Government has violated the constitutional rights of an American who became disabled in the service of his country. Blough has a constitutional right to be free from and to obtain judicial relief for unjustified intrusions on personal security in the employ of the United States Government. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977). Based upon the federal employment benefits extended to disabled veterans by Congress, Blough's expectation of process was justifiable and did rise to the level of a constitutionally protected liberty interest. United States v. Stead, 740 F.2d 657 (8th Cir. 1984).

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII may restrict a veterans constitutional rights and the courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

The section 717 restriction on remedy was inferred by the United States Supreme Court in *Brown v. General Services Administration*; however the language of section 712 of Title VII is explicit and unchanged since Congressional enactment.

Section 712 of Title VII of the Civil Rights Act of 1964 provides that section 717 is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of permanent and total disability. The fact said veteran is an employee of the United States Government should not deprive him of his constitutional rights.

As previously stated, section 717 of Title VII of the Civil Rights Act of 1964, as amended, is not unconstitutional in that Congress did provide protection to the fundamental constitutional rights of totally and permanently disabled veterans via section 712 of the respective Act. The inferred judicial limitations of section 717 as stated by the Supreme Court in *Brown v. General Services Administration* are subject to remedy by the Supreme Court. Section 712 of Title VII was not referenced in *Brown v. General Services Administration nor Porter v. Adams*, supra, and therefore was not a fact in consideration by the respective courts. No Federal court has considered the section 712 exception as presented.

Issue number two was initially presented by Blough in the motion to amend the complaint in the prior litigation (R1-10-97SR), in the brief/reply brief/petition for rehearing en banc of the appeal in the initial litigation (Exhibit C record excerpts), and in response to Government's motion for summary judgment in the current litigation (R1-10 page 8). The district court and the appellate court were non-responsive to this issue in the current and prior litigation.

ISSUE NUMBER THREE OF APPELLANT'S BRIEF

The United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit did not consider Appellant's (hereafter Blough) pleadings in the prior litigation and have applied the doctrine of res judicata to the current litigation. The actions of the respective Courts constitute an abuse of power in the denial of a full and fair opportunity to litigate a Complaint of Constitutional tort by the United States Government. The violation of Blough's Fifth Amendment right to procedural due process reflects disparate treatment and is unconstitutional.

Government's brief provides no comment relative to the specific documentation presented in Blough's appeal. The essence of Government's unsupported argument is that Blough failed to plead his Fifth Amendment claim in the prior litigation. The following facts are improperly stated in Government's brief:

1. The basis for the complaint is misstated (R1-1).

2. (Page 5) The Government did also argue on summary judgment that Blough's claim was barred by *Brown v. General Services Administration*, supra, (R1-8 page 7).

3. (Page 6) The district court (R1-10-111SR) did not deny Blough's motion to amend (R1-10-97SR) the initial complaint (R1-10-1SR) and this court did not affirm said denial (R1-10 Exhibit C). The appellate court did affirm the denial of the motion to amend complaint to include violations under the 1973 Rehabilitation Act (R1-10-33SR).

"A complaint must contain, *inter alia*, ' a short and plain statement of the claim showing that the pleader is entitled to relief.'" Baldwin County Welcome Center

v. Brown, 104 S. Ct. 1723, 1725 (1984) citing Fed. Rule Civ. Proc. 8(a)(2).

"First, plaintiff's additional claims were not pleaded in her complaint. The sentence in her charge is no more than a general claim on behalf of all women employees. It did not provide notice to the defendants that plaintiff sought recovery based on acts as described in the pretrial stipulation, the 1977 letter, and 1978 charge. Thus, as to her additional claims, the complaint failed to set forth a 'short and plain statement ... showing that the pleader is entitled to relief.' Rule 8(a)(2). *See Uptown People's Community Health Services v. Board of Commissioners of Cook County*, 647 F.2d 727, 729, 739 (7th Cir. 1981) (count in complaint too indefinite; '[w]hile it is true that 'notice pleading' is an integral part of the federal rules governing pleadings, it is still necessary that *something* be stated that apprises a defendant of the substance of the allegation' (emphasis in the original); *Ogletree v. McNamara*, 449 F.2d 93, 98-99 (6th Cir. 1971) ('[s]omething more than [a] conclusory allegation of systematic racial discrimination is required. Some facts as to when, how, to whom, and with what results such discrimination has been applied' are minimum requirements of Rule 8(a)." Coon v. Georgia Pacific Corp., 829 F.2d 1563, 1569 (11th Cir. 1987).

"Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Coon, supra a 1569 (citing Conley v. Gibson, 78 S. Ct. 99, 103 (1957)).

A motion to amend the initial complaint (R1-10-97SR) under Rule 15(a) of the Federal Rules of Civil

Procedure was filed with the district court one month prior to the date on which all briefs were required to be filed. The Government did respond to the court in opposition to said motion (R1-10-99SR). The following notification was provided to the defendant (Government) within plaintiff's (Blough) motion to amend (R1-10-97SR):

> "Plaintiff respectfully requests that the Court grant this request to amend the initial Complaint to include a claim of action against Defendant for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.
>
> Jurisdiction is conferred on the Court by 28 U.S.C. section 1331 in that the basis for this amended claim arises under the Federal Constitution.
>
> Title VII of the Civil Rights Act of 1964 is not the exclusive remedy for Plaintiff in that Section 712 of the Act provides that "nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans". Under the analysis presented by the United States Supreme Court in Washington v. Glucksberg, 117 S. Ct. 2258 (1997) ; a one hundred percent (100%) physically disabled veteran has a fundamental Constitutional right not to be threatened, harassed and retaliated against by the same government which put him in harms way in Viet Nam.
>
> The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for

adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

The notification (R1-10-97SR) provided to defendant (Government) in the initial litigation not only met, but exceeded the requirements of *Baldwin County Welcome Center*, supra, *Coon v. Georgia Pacific Corp.*, supra, and *Conley v. Gibson*, supra. The defendant was apprised of the substance of the allegation and the grounds upon which it rests. The actions describing when, how, to whom, and with what results were spelled out in great detail within the initial complaint (R1-10-1SR) and were "also the basis of this Fifth Amendment claim".

Neither the district court in the initial litigation, this appellate court, nor the district court in the current litigation read Blough's pleadings which clearly referenced the motion to amend the initial complaint (R1-10-97SR) and the Governments opposition (R1-10-99SR). Said motion was referenced in district court initial litigation (R1-10-97SR, 99SR, 104SR, 107SR), appellate court (Record Excerpts C/ Brief pages 2, 7, 8, 11/Reply Brief page 6/Petition for rehearing en banc pages 2, 3, 5), district court current litigation (R1-1 page 2, R1-10 pages 2, 3, 13, 14, R1-10-97SR, 99SR, 104SR, 107SR).

The decisions in Montana v. United States, 99 S. Ct. 970 (1979) and Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999) were based upon the premise, **before any other considerations**, that the relevant party has "**had a full and fair opportunity to litigate**". The United States Supreme Court has repeatedly recognized the absolute necessity that the party against whom the earlier decision is asserted must have been afforded a **full and fair opportunity to litigate** that issue in the earlier case. Allen v.

McCurry, 101 S. Ct. 411, 415 (1980). The *opportunity* to be heard is a fundamental requirement of procedural due process. Grannis v. Ordean, 34 S. Ct. 779, 783; Armstrong v. Manzo, 85 S. Ct. 1187, 1191 (1965); Boddie v. Connecticut, 91 S. Ct. 780, 784 (1971). Blough **was denied a full and fair opportunity to litigate** in the earlier case and therefore the doctrine of res judicata does not apply to the current litigation (R1-11).

Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action. Cafeteria & Restaurant Workers Union v. McElroy, 81 S. Ct. 1743, 1748 (1961).

Government contends at page ten of brief that the proper standard of review is for abuse of discretion. Blough continues to believe that the correct standard of review is for abuse of power by the respective district court and the appellate court in the deliberate denial of due process. Daniels v. Williams, 106 S. Ct. 662, 665 (1986). Blough did clearly apprise the respective courts of the claim of constitutional tort in the initial proceedings (R1-10-97SR). The Orders by the respective courts indicate that Blough's pleadings were not reviewed by the respective courts (R1-10-111SR, R1-10-Exhibit B, R1-11). Issue number three is not presented as a matter in dispute between the parties, but rather as an unsettled matter ready for a decision by the United States Supreme Court.

CONCLUSION

WHEREFORE, Blough respectfully requests that this court grant the petition for en banc consideration of

certification under Title 28 U.S.C. section 1254(2) which is pending before this court. This is a case of national significance which addresses the constitutional rights of millions of veterans in the employ of the Federal government and the constitutional right of pro se litigants to due process within the Federal courts.

Respectfully submitted under penalty of perjury this fifteenth day of March, 2001.

"S/Melvin E. Blough" pro se

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803 Tomahawk Trail
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan H. Rothstein-Youakim (Suite 3200, 400 North Tampa Street, Tampa, FL. 33602) this fifteenth day of March, 2001.

"S/Melvin E. Blough" pro se

00-16546-F

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY,
PAUL H. O'NEILL, Secretary of the Treasuy,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 00-1631 CV-T -26E)

PETITION FOR EN BANC CONSIDERATION OF CERTIFICATION UNDER TITLE 28 U.S.C. SECTION 1254(2)

MELVIN E. BLOUGH
Pro Se - Appellant
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Brandon, FL 33511
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BLOUGH v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE TREASURY, Secretary of the Treasury

(11th Cir. - No. 00-16546-F)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Paul H. O'Neill, Secretary of the Treasury, defendant-appellee;

2. Melvin E. Blough, plaintiff-appellant, pro se;

3. Susan H. Rothstein-Youakim, Assistant United States Attorney, appellate counsel for United States of America;

4. David P. Rhodes, Assistant United States Attorney, appellate counsel for United States of America;

5. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

6. Donna A. Bucella, United States Attorney;

7. The Honorable Susan C. Bucklew, United States District Judge;

8. The Honorable Richard A. Lazzara, United States District Judge;

9. Circuit Judges Godbold, Roney, Hill, Fay, Kravitch, Clark, Anderson, Tjoflat, Edmondson, Cox, Birch, Dubina, Black, Carnes, Barkett, Hull, Marcus and Wilson to the United States Court of Appeals for the Eleventh Circuit;

10. Todd Bradshaw Grandy, Assistant United States Attorney, district court counsel for the United States of America.

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STATEMENT OF ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION OF CERTIFICATION TO THE UNITED STATES SUPREME COURT:

The "national debt" is not measured in dollars, but rather in the number of lives lost and lives crippled in service to America by its veterans. With the exception of those who lost their lives in service to their country; the American public has no greater obligation than to those veterans who became totally and permanently disabled in the service of their country.

A constitutional right is fundamental if it is "preservative of all rights". Yick Wo v. Hopkins, 6 S. Ct. 1064, 1071 (1886). This appeal is unique in that the United States Government/Department of the Treasury and the respective Federal courts have violated and denied a constitutional obligation of "**We the people ...**" to totally and permanently disabled veterans. Inherent to status as a totally and permanently disabled veteran is a fundamental right to due process in the protection of Fifth Amendment liberty interests under the United States Constitution.

The procedural due process violations presented as issues number one and two are unsettled questions of law and factual matter within the court record. The substantive due process violations presented as issues number one and three are questions of law which are in dispute and are properly resolved by the United States Supreme Court based upon Court precedent.

1. "A necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the

defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of the **purely legal question** (emphasis added) permits courts expeditiously to weed out suits which fail the test." Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991).

Do totally and permanently disabled veterans have an inherent fundamental and constitutionally protected Fifth Amendment liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. The district court cannot treat as "final", that which is not "final" within the meaning of section 1291. Sears, Roebuck and Co. v. MacKey, 76 S. Ct. 895, 900 (1956).

What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made. Parham v. J.R., 99 S. Ct. 2493, 2507 (1979).

The United States Government in the capacity of the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit has engaged in the unconstitutional act of denying due process to a totally and permanently disabled veteran in a complaint of constitutional tort by the United States Government. The court record (R1-10, 11) clearly reflects the fact that the respective courts were predetermined to dispose of the complaint at their earliest convenience and did not consider the pleadings as presented by appellant

(hereafter Blough). The actions of the respective courts were in fact a pretense of due process, *Palko v. State of Connecticut*, 302 U.S. 319 (1937), constituting an intentional abuse of judicial power such as to call for an exercise in the supervisory power of the United States Supreme Court.

3. "(Title VII) Section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. 1961, 1969 (1976).

"Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*." Title VII Section 712 of the Civil Rights Act of 1964.

Does recognition of the constitutional right as stated in issue number one above; provide a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by the United States Supreme Court in *Brown v. General Services Administration* ?

The United States Supreme Court requirements of definiteness in the presentation and strict necessity in the determination of constitutional questions are satisfied. The adequacy of process presented as issue number two and the *Federal law creating special rights for veterans* presented as issue number three are both dependant upon the specific determination presented as issue number one. A negative response to any one of the three issues presented is fatal to this complaint of constitutional tort by appellee (hereafter Government).

The case law and facts present the rare instance when certification to the United States Supreme Court is advisable in the proper administration and expedition of judicial business as provided in *Wisniewski v. United States*, 77 S. Ct. 633 (1957). This appeal warrants certification based upon the following considerations:

A) The necessary determination of an inherent constitutional right which is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Palko v. State of Connecticut, supra;*

B) The judicial conduct of the respective lower courts in denying that process which was constitutionally due. "No later hearing and no damage award can undo fact that arbitrary taking that was subject to right of procedural due process has already occurred." Fuentes v. Shevin, 92 S. Ct. 1983, 1995 (1972).

C) The conflict between the United States Supreme Court's **implied** restriction in *Brown v. General Services Administration, supra*, and the **explicit** exception provided by Congress under section 712 Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE:

Blough did initiate suit in district court alleging civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (R1-10-1SR). Blough did motion the court to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR) and a claim of constitutional tort

against the Government (R1-10-97SR, 99SR, 104SR). The court ruled (R1-10-111SR) upon Government's motion for summary judgment denying Blough's Title VII complaint and Blough's motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR). The claim of constitutional rights violations which were put in issue in the amended complaint and the Government's response (R1-10-97SR, 99SR, 104SR) were neither involved nor adjudicated by the Order of the district court (R1-10-111SR).

Blough did appeal the decision by the district court (R1-10-111SR) to this court (case no. 99-13735-FF) in that the motions (R1-10-97SR, 99SR, 104SR) to amend the initial Complaint (R1-10-1) to include a claim of constitutional deprivation of a fundamental and protected liberty interest by Government were neither involved nor adjudicated by the Order of the district court (R1-10-111SR). Copies of Blough's pleadings to the Eleventh Circuit are located within the record excerpts to this appeal (Exhibit C). This court did not address the failure of the lower court to involve and adjudicate the claim of constitutional tort which was argued by Blough in his Brief, Reply Brief and Petition for Rehearing En Banc (R1-10-Exhibit B SR).

Blough filed a new action (R1-1) alleging the claim of constitutional rights violations which were previously raised in the initial proceedings (R1-10-1SR, 32SR, 97SR, 104SR, 107SR). The district court did grant Government's motion for summary judgment (R1-8) based upon the doctrine of *res judicata* (R1-11) and said Order is the subject of this appeal.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF PROCEDURAL DUE PROCESS VIOLATION PRESENTED AS ISSUES NUMBER ONE AND TWO:

Status of Blough providing for inherent constitutionally protected liberty interest:

Blough is one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs (source: Department of Veterans Affairs FY 1998 Annual Report). Blough has two artificial legs and loss of use of one hand as a result of service in Vietnam (R1-10-25SR). The United States Government has since 1970 accepted full responsibility and liability for the aforementioned status of Blough.

Blough has been employed by the United States Government/Department of the Treasury since 1979 as an Internal Revenue Agent (R1-10-25SR).

THE INITIAL CONPLAINT

The complaint as initially filed with the district court on June 29, 1998 did encompass a claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (R1-1SR). The initial complaint did reference the physical disabilities of Blough, the threats of physical injury to Blough and the informal response/formal acceptance of said threats by the Government (Department of the Treasury and the Equal Employment Opportunity Commission).

The claim to violation of a protected Fifth Amendment liberty interest was asserted before the

court in the presence of Government's counsel at an early stage of the initial proceedings (R1-10-32SR page 17):

> "My basis for claim is that they violated my Fifth Amendment right to liberty. There's a tradition in this country, and you don't do certain things. And one of the things you don't do is you don't tell a disabled veteran with two artificial legs you are going to push him down a flight of stairs. You have taken away my sense of security. You don't have that right to do that. Nobody has that right."

Blough did file motions to amend the initial complaint (R1-10-1SR) under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR), and a claim of constitutional tort against Government (R1-10- 97SR, 104SR).

The following statements were presented in Blough's motion for leave to amend the initial complaint (R1-10- 97SR) under rule 15(a):

> "The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

Government's motion for summary judgment was taken under submission by the district court on

September 10, 1999. Briefs and affidavits of the parties were to be filed by said date.

A) On September 10, 1999 the court was in possession of Blough's motion to amend the initial complaint, memorandum of law in support of motion to amend the complaint, and the Government's motion in opposition to the motion to amend the complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR).

B) Prior to September 10, 1999 the court was in possession of Blough's motion to amend the initial complaint, memorandum of law in support of motion to amend the complaint, and the Government's motion in opposition to the motion to amend the complaint to include a claim of constitutional tort against Government (R1-10-97SR, 99SR, 104SR).

The district court did concurrently grant Government's motion for summary judgment in the complaints of Civil Rights and Rehabilitation Act violations (R1-10-111SR); however did abuse its power in that the court did not consider Blough's pleadings in response to the Government's motion for summary judgment (R1-10-107SR) and Blough's motion to amend the initial complaint to include a claim of constitutional tort by Government (R1-10-97SR, 99SR, 104SR). These conclusions are evident upon review of the Order of the district court (R1-10-111SR) and the supplement to the record currently before this court (R1-10):

A) The following statement is presented within the initial paragraph of the Order of the

district court(R1-10-111SR):

> "This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107)."

The following statements were presented in Blough's response to Government's motion for summary judgment (R1-10-107SR):

> "Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint.
>
> Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. **The facts are consistent with each route; however the law and remedies differ** (emphasis added).
>
> 1. Deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

2. Unlawful intentional discrimination which is prohibited under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

3. Unlawful intentional discrimination which is prohibited under the Rehabilitation Act of 1973, as amended."

Conclusion: The district court did not review Blough's pleadings (R1-10-107SR) in response to Government's motion for summary judgment in that the Order of the district court (R1-10-111SR) does not reference the motion to amend for constitutional tort (R1-10-97SR, 99SR, 104SR) which was prominent in said pleadings.

Review of the Order of the district court (R1-10-111SR) in conjunction with Blough's response to Government's motion for summary judgment (R1-10-107SR) provides further evidence that the district court did not review Blough's pleadings. The Order misrepresents the pleadings of both parties, creates an absurd scenario and then ridicules Blough for proposing said scenario.

The following statement is also presented within the initial paragraph of the Order of the district court (R1-10-111SR):

"Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. 104 and 105."

Document 104 (R1-10-104SR) is a five page memorandum of law in support of Blough's motion the amend the initial complaint to include a claim of constitutional tort against the Government (R1-10-97SR) and was filed in response to the Government's motion in opposition to Blough's motion to so amend (R1-10-99SR).

Document 105 is a three page motion and memorandum of law requesting a trial by jury. The following comments are noted within said motion:

> "1. Although the 5th amendment claim was at the heart of the initial complaint, it was a difficult issue for pro se Plaintiff to frame.
>
> 2. The second motion to amend the initial complaint does contain an issue which is best addressed by a jury (i.e. deprivation of a fundamental and protected liberty interest which exists within the fifth amendment to the United States Constitution.
>
> 3. Defendant was apprised of this 5th amendment challenge upon consideration of the facts presented in the initial complaint, the preliminary injunction hearing, and during the deposition of Plaintiff by Defendant."

Conclusion: The district court did not review either Document No. 104 or Document No. 105 in that the Order of the district court (R1-10-111SR) does not reference the motion to amend for constitutional tort which was prominent in both documents.

A) The following statement is also presented within the initial paragraph of the Order of the district court (R1-10-111SR):

> "Also before the Court is plaintiff's Motion to Amend Complaint (Doc. No. 33) and defendant's response in opposition (Doc. No. 36)."

The Order was limited to the alleged violations under Title VII of the Civil Rights Act of 1964, as amended, (R1-10-1SR) and the motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR). The Order by the district court (R1-10-111SR) specifically states "Plaintiff's Motion to Amend Complaint (Doc. No. 33) is denied for the reasons set forth in this Order".

THE INITIAL APPEAL

On May 9, 2000 the appellate court "rubber stamped" (R1-10-Exhibit B SR) the decision of the district court denying the complaint of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (R1-10-1) and Blough's motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR). The appellate court failed to provide comment relative to Blough's appeal of the district court's failure to address the motions to amend the initial complaint to include a claim of constitutional tort (R1-10-97SR, 99SR, 104SR).

THE CURRENT APPEAL

The Complaint of August 8, 2000 (R1-1) includes the following reference to the prior litigation:

> "The Court did fail to address the specific allegations of Constitutional rights violations which **were presented as an amendment** to the above referenced Complaint of civil rights violations. 'We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.' Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in the Complaint under the 'constitutional standards' required by the United States Supreme Court in** *Washington v. Davis, supra.*"

The district court did grant Government's motion for summary judgment (R1-8) based upon the doctrine of *res judicata* (R1-11) and Blough has appealed said decision to this court (R1-13). The district court's decision and Blough's appeal are based upon the following statement by the trail judge in the dispositive Order (R1- 11) and reflects upon a continuing abuse of power by the courts in the myopic view of the facts presented (R1-10) in Blough's asserted right to due process of law:

> "Moreover, as the Plaintiff has conceded, the claim he asserts in this case was always a part of the claim he asserted in the prior case. Even if it were not, it is manifestly clear from the record that the Plaintiff was well aware of the so-called constitutional tort claim based on the Fifth Amendment at the very inception of the earlier case and, therefore, **could easily have raised it in that case** (emphasis added)."

ARGUMENT AND CITATIONS OF AUTHORITY RELATIVE TO PROCEDURAL DUE PROCESS VIOLATION PRESENTED AS ISSUES NUMBER ONE AND TWO:

Based upon the standards established by the United States Supreme Court in Washington v. Glucksberg 117 S. Ct. 2258, 2269 (1997), Blough has a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the same government which put him in harms way in Vietnam.

The constitutional violations of Blough's rights by the United States Government were invidious in nature and so unjustifiable as to be violative of due process under United States v. Gilman, 74 S. Ct. 695 (1954) and subject to challenge under Washington v. Davis, 96 S. Ct. 2040 (1996).

The first time Blough felt handicapped after Vietnam was when Group Manager Prowler put his fist in Blough's face and backed him against those file cabinets. He took something special away from Blough that day and in doing so violated Blough's inherent Fifth Amendment right to be free from unjustified intrusions on personal security. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977). The continuing threats of physical injury, the Government's written response that said threats were not carried out and therefore no process was due Blough, the continuing harassment and retaliation over a nine year period were all supported by extensive documentation and third-party testimony obtained during the discovery phase of the initial complaint and were presented to the respective courts (R1-10-32SR, 107SR). Based upon the federal employment benefits extended to disabled veterans by

Congress and the national obligation to totally and permanently disabled veterans, Blough's expectation of process was justified and did rise to the level of a constitutionally protected liberty interest.

The district court and the appellate court did, on three occasions prior to this appeal, fail to read Blough's amended complaint of constitutional tort and the Government's response (R1-10-1SR, 32SR, 97SR, 99SR, 104SR, 107SR). This complaint now revolves around questions of law and the conduct of the respective courts as opposed to the facts reflecting upon the violations of Blough's Fifth Amendment liberty interest by the Government. "Unfortunately, this is another instance of judicial haste which in the long run makes waste.'" Estelle v. Gamble, 97 S. Ct. 285, 295 (1976) (citing Dioguardi v. Durning, 139 F.2d 774 (C.A.2, 1944)).

The claim of constitutional tort was raised by the following statement in open court and brought no response from the court or the Government - "My basis for claim is that they violated my Fifth Amendment right to liberty" (R1-10-32SR page 17). In the initial litigation the courts and the Government were also advised of the claim of constitutional tort which was subsumed in the initial complaint filed under Title VII of the Civil Rights Act of 1964 (R1-10-1SR), requested by motion to amend which was properly filed with the court (R1-10-97SR, 99SR, 104SR) and referenced in Blough's response to Government's motion for summary judgment (R1-10-107SR). The issues proposed by the amended claim of constitutional tort (R1-10-1SR, 32SR, 97SR, 99SR, 104SR, 107SR) were legal and required no additional discovery to posture them for adjudication. The cause of action arose under a different law by the amendment, but the facts constituting the tort were the same, whichever law gave them that effect, and

there was no surprise to the Government in said amendment.

The appellate court did not apply the required de novo standard of review to the Order of the district court (R1-10-111SR) and the facts within the court record (R1-10). This was an intentional abuse of power by the court in that the required procedural due process and the inseparable inherent fundamental constitutional right were both ignored by the court.

Government's motion for summary judgment in the current litigation (R1-8) is correct in that A) the initial complaint of civil rights violations (R1-10-1SR); B) the motion to amend said initial complaint to include a claim of constitutional tort (R1-10-97SR, 99SR, 104SR); and C) the complaint of constitutional tort before this court (R1-1) involve the same parties and the same nucleus of operative fact; however the Government is incorrect in that the initial court did not involve and the Order of said court (R1-10-111SR) did not adjudicate the motion to amend the initial civil rights complaint to include a claim of constitutional tort (R1-10-1SR, 32SR, 97SR, 104SR, 107SR). A final judgment on the merits of the claim of constitutional rights violations has not been rendered by a court of competent jurisdiction as required by Southern Pacific R. Co. v. United States, 18 S. Ct. at 27 (1897).

The statement within the district court Order under appeal (R1-11) that Blough **could easily have raised it (constitutional tort claim) in that (earlier) case** was an intentional abuse of power in the denial of procedural due process. The court made no effort to read the facts presented in Blough's pleadings (R1-10). It is abundantly clear from the pleadings and factual record before that court and this court (R1-10) that the claim of constitutional tort and the Government's opposition were distinctly put in issue

during the course of the initial litigation (R1-10-1SR, 32SR, 97SR, 99SR, 104SR, 107SR), the court in the initial litigation did not involve and the Order of the court (R1-10-111SR) did not adjudicate the motion to amend the initial complaint to include a claim of constitutional tort.

The decisions in Montana v. United States, 99 S. Ct. 970 (1979) and Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999) were based upon the premise, **before any other considerations**, that the relevant party has "**had a full and fair opportunity to litigate**". The United States Supreme Court has repeatedly recognized the absolute necessity that the party against whom the earlier decision is asserted must have been afforded a **full and fair opportunity to litigate** that issue in the earlier case. Allen v. McCurry, 101 S. Ct. 411, 415 (1980). The *opportunity* to be heard is a fundamental requirement of procedural due process. Grannis v. Ordean, 34 S. Ct. 779, 783; Armstrong v. Manzo, 85 S. Ct. 1187, 1191 (1965); Boddie v. Connecticut, 91 S. Ct. 780, 784 (1971). Blough **was denied a full and fair opportunity to litigate** in the earlier case and therefore the doctrine of res judicata does not apply to the current litigation (R1-11).

ARGUMENT AND CITATIONS OF AUTHORITY RELATIVE TO SUBSTANTIVE DUE PROCESS VIOLATIONS PRESENTED AS ISSUES NUMBER ONE AND THREE:

The Federal question presented as issues number one and three are purely questions of law and are essential to this complaint of substantive and procedural due process violations.

The Federal Government has engaged in preferential hiring of veterans through official policies

and various special laws since the Civil War. Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The protection afforded the special rights and preferences for veterans under section 712 of Title VII of the Civil Rights Act of 1964 from constitutional challenge was recognized by the Supreme Court in Personnel Adm'r of Massachusetts v. Feeney, at 2286.

Government relies (R1-8- page7) upon the United States Supreme Court's determination that **section 717** of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment, Brown v. General Services Administration, 96 S. Ct. at 1969, and therefore; Blough has no legal basis to complain of violations under the Fifth Amendment to the United States Constitution. The Government did also claim the limitations of *Brown v. General Services Administration* in Government's motion (R1-10-99SR) in opposition to Blough's motion to amend the initial complaint to include a claim of constitutional tort (R1-10-97SR).

Section 712 of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Administration, 96 S. Ct. at 1969. Reliance by the Government on *Brown v. General Service Administration* is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 that "**nothing contained in this title shall be construed to repeal or modify any Federal ..... law creating special rights ... for veterans**" and the findings by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights. Blough did make

this argument in the motion to amend the initial complaint to include a claim of constitutional tort (R1-10-104SR), in the initial appeal to the United States Court of Appeals for the Eleventh Circuit (Exhibit C record excerpts to this appeal), and in response to Government's motion for summary judgment (R1-10) in the current litigation.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. Brown v. General Services Administration, at 1964 (Citing Bolling v. Sharpe, 74 S. Ct. 695 (1954)). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Brown v. General Services Administration, 96 S. Ct. at 1968. Section 717 of Title VII of the 1964 Civil Rights Act, as amended, leaves undisturbed whatever remedies Blough might otherwise possess. Davis v. Passman, 99 S. Ct. 2264, 2278 (1979). As in the case of Brooks v. United States, 69 S. Ct. 918 (1949), it would be absurd to believe congress did not have the Constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964 and a reading of the entire Act reflects upon such an objective and policy. Blough is therefore permitted to pursue his rights under both Title VII of the Civil Rights Act of 1964, as amended, and any other law creating a special right as a totally and permanently disabled veteran.

The section 717 Title VII restriction on remedy was **inferred** by the United States Supreme Court in *Brown v. General Service Administration*; however the language of section 712 Title VII is **explicit** and has remained **unchanged** since Congressional enactment.

No provision of Title VII of the Civil Rights Act of 1964, as amended, may restrict the inherent constitutional rights of totally and permanently disabled veterans who have been recognized as entitled to the constitutional right presented as issue number one. The courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of said veterans under the Constitution of the United States. The fact said veterans are employees of the United States Government does not deprive them, but rather bestows upon them a justified expectation of process in a constitutionally protected liberty interest.

CONCLUSION

This is a complaint of constitutional tort for actions by the United States Government which were egregious and continuous in nature. Said actions were the direct result of an abusive institutional environment within the United States Department of the Treasury and the respective Federal courts; which did promote and fail to provide a venue for relief from said actions.

The record clearly indicates that Blough did raise the claim of constitutional tort based on the Fifth Amendment in the prior litigation (R1-10-1SR, 32SR, 97SR, 99SR, 104SR, 107SR) . The purpose in Rule 15(a) of the Federal Rules of Civil Procedure is to afford the injured party the full and fair opportunity to be heard. The intentional abuse of power by the respective Courts in the denial of Blough's right to a "full and fair opportunity to litigate" the alleged constitutional rights violations in the prior litigation and the current litigation is reflective of a system which is overwhelmed and frustrated. The frustration within said system is directed to the perceived cause of the problem and those least able to defend (i.e. the pro se litigant). Pro se litigants have one and only

one characteristic in common ---- they believe the Federal courts will treat them fairly.

The questions of law revolving about the asserted constitutional rights are worthy of review by the United States Supreme Court based upon consideration of the Supreme Court's decision in *Brown v. General Services Administration, supra,*. 96 S. Ct. at 1968. Based upon the facts specific to this complaint, there is an obvious conflict between the Supreme Courts **implied** judicial restrictions associated with actions under section 717 and the **explicit** exception provided under section 712 of Title VII of the Civil Rights Act of 1964, as amended. The conflict within the statute requires resolution by the United States Supreme Court.

WHEREFORE, Blough respectfully requests that this court certify to the United States Supreme Court to resolve these questions of law which are of national significance in addressing the constitutional obligation of the American people to provide and protect the inherent Fifth Amendment rights of totally and permanently disabled veterans.

Respectfully submitted under penalty of perjury this twenty-third day of February, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan H. Rothstein-Youakim (Suite 3200, 400 North Tampa Street, Tampa, FL. 33602) this twenty-third day of February, 2001.

"S/Melvin E. Blough" pro se